Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

LYNN A. SCHEIB, BENJAMIN GROSSE, a minor, by LYNN A. SCHEIB, his next friend and CARL SCHEIB,

Petitioners,

v.

JOAN C. GRANT, BURTON F. GRANT, and DOROTHY B. JOHNSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JACK JOSEPH
MICHAEL P. MYERS
JOSEPH AND MYERS
33 North Dearborn Street
Suite 1410
Chicago, Illinois 60602
(312) 346-9887

AARON S. WOLFF
Counsel of Record
33 North Dearborn Street
Suite 1410
Chicago, Illinois 60602
(312) 346-3461

G. ROBERT BLAKEY
Notre Dame Law School
Notre Dame, Indiana 46656
(219) 631-5717

Attorneys for Petitioners

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Does the Federal Wiretap Act, which prohibits "any person" from "intercept[ing a] . . . wire or oral communication except as otherwise specifically provided" –

1. impliedly include any kind of "domestic relations" exemption, or

2. expressly permit an ex-spouse secretly to tape record calls between his ex-spouse and their minor child and use the contents of the tape against his former spouse in pending state court domestic relations litigation under the "ordinary course of business" telephone extension exemption?

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v.

JOAN C. GRANT, BURTON F. GRANT, and DOROTHY B. JOHNSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on April 15, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at ___ F.3d ___ (7th Cir.

1994) and is reproduced in the Appendix at pp. App. 1 – App. 20.

The opinion of the United States District Court for the Northern District of Illinois is reported at 814 F.Supp. 736 (N.D. Ill., 1993) and is reproduced in the Appendix at pp. App. 21 – App. 32.

JURISDICTION

The Court of Appeals entered judgment on April 15, 1994. A timely petition for rehearing with suggestion for rehearing *en banc* was filed. After requiring respondents to answer the petition, the court denied it on June 2, 1994. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Omnibus Crime Control and Safe Streets Act
18 U.S.C. §§2510-2521

§2510. Definitions

As used in this chapter –

> (1) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . , but such term does not include the radio portion of a cordless telephone communication that is transmitted

between the cordless telephone headset and the base unit;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

* * *

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device;

(5)(a)(i)(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral or electronic communication other than –

> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business;

(6) "person" means any . . . individual . . . ;

* * *

(8) "contents", when used with respect to any wire, oral, or electronic communication,

includes any information concerning the substance, purport, or meaning of that communication;

* * *

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

§2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who –

* * *

(c) intentionally discloses, or endeavors to disclose, to ~~any other~~ person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

* * *

(2) (d) It shall not be unlawful under this chapter for a person not acting under color of law to

> intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

§2520.

(a) In general. – Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. – In an action under this section, appropriate relief includes –

> (1) such preliminary and other equitable or declaratory relief as may be appropriate;
>
> (2) damages under subsection (c) and punitive damages in appropriate cases; and
>
> (3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages. – * * *

(2) In any other action under this section, the court may assess as damages whichever is greater of –

> (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is greater of $100 a day for each day of violation or $10,000.

STATEMENT OF THE CASE

This case poses important issues under Title III of the Omnibus Crime Control & Safe Streets Act of 1968 ("Title III" or the "Wiretap Act") that have not been resolved by this Court, but have given rise to substantial conflicts among the courts of appeals:

(1) Does Title III permit an implied domestic relations exemption, and

(2) If not, is it nonetheless in "the ordinary course of . . . business" for an ex-spouse and non-custodial parent to tape calls between his minor child and the other parent and legal custodian, and immediately use the taped information in state court domestic relations litigation pending against the ex-spouse?[1]

These issues arise out of the following facts. Petitioners are: Lynn Scheib ("Lynn"), mother and *custodial* parent of Benjamin Grosse ("Ben"); Ben, a minor who was 11 years old at the time of the wiretapping; and Carl Scheib ("Carl"), Lynn's present husband. They were parties to telephone conversations that were tapped and

[1] Implicit, but not specifically addressed below, is the issue: Does a minor child have a constitutional right of privacy in telephone conversations with his mother/legal custodian or can it be lawfully invaded by the other parent and non-legal custodian?

taped without their knowledge or consent by Lynn's ex-husband and Ben's father, James Grosse ("James").

James and Lynn were married in 1975, had one child, Ben, and were divorced in 1982. Lynn was granted – and always retained – sole custody of Ben. At all relevant times prior to 1991, they all lived in the Chicago area. In early 1991, Lynn told James that she planned to marry Carl, who had been offered a job in Pennsylvania, that they intended to move there, and that new visitation arrangements were needed.[2] She understood that court approval was required to remove Ben from Illinois but sought to reach agreement in advance to avoid undue legal expense.

James retained attorneys, the Respondents Joan and Burton Grant. Instead of attempting to negotiate terms appropriate to the changed circumstances, the Grants immediately sought a preliminary injunction to restrain Lynn from removing Ben from Illinois. Considerable litigation ensued in the Domestic Relations Division of the Circuit Court of Cook County (the "state court"). Lynn filed a petition to remove Ben to Pennsylvania and for substantial past due child support. James resisted and sought to have Ben's custody changed to him. Respondent Dorothy Johnson was appointed guardian *ad litem* ("GAL") to represent Ben's interests. (Johnson and the Grants are the "Respondents.")

After extensive negotiations, a global settlement was reached, and the parties, including the GAL, executed a

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[2] All dates are in 1991 unless otherwise stated.

settlement agreement on June 19, under which Lynn continued to have sole custody of Ben. James was given expanded visitation rights, including 47 days in the summer, beginning on June 19. Relying on the signed agreement, but before its scheduled prove-up on July 2, Lynn moved to Pennsylvania and Ben went to James' home in Illinois for visitation. During that period, Ben, his mother and Carl talked on the telephone.

Without their knowledge or consent, James tapped and taped with his telephone answering machine at least two calls, the last one on July 1. James did not overhear the conversations and learned of their alleged content only by listening to the tapes. He did not record any of Ben's calls other than those with Lynn and Carl.

Respondents claimed in James' affidavit that the tapping was motivated by James' concern that Ben seemed upset after speaking with his mother. In fact, Ben's affidavit shows that he was upset before the phone calls and was not upset by his mother's calls, but rather by certain actions of his step-mother, James' present wife, *prior* to the calls. One of Lynn's attorneys, to whom Joan Grant had played a portion of a tape on July 1, stated in his deposition that Ben's "crying" on the tape was "prompted by unhapp[iness] with his father".[3]

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[3] Petitioners asserted below, and still believe, that summary judgment was precluded by triable issues of material fact, but do not raise that question here. *See, e.g., Stockler v. Garratt*, 893 F.2d 856, 860 (6th Cir. 1990) (if conflicting inferences may be drawn as to purpose of the tap, summary judgment improper). In *Wilmington Trust Co. v. Manufacturer's Life Insurance Co.*, 624 F.2d 707 (5th Cir. 1980), cited with approval in *Corrugated Paper*

On July 1, James took the tapes to the Respondent Grants who knew, or had reason to know, that the tapes were of calls intercepted without the participants' consent. On July 1, the Grants disclosed contents of the tapes to Respondent Johnson and to one of Lynn's attorneys. On July 1, Respondent Joan Grant told Lynn's attorneys that, based on the tapes, they would repudiate the settlement.

Just before the hearing on approval of the settlement agreement on July 2, the Respondents said again that based on the tapes, they would not adhere to the settlement agreement and intended to pursue a change in Ben's custody. Lynn's attorneys then told Respondents that whatever was allegedly on the tapes, since they were made illegally, they were inadmissible.

At the outset of the July 2 hearing, the state court judge said the settlement agreement looked okay, but Respondents said they would not proceed with it.

On August 2, the state court held, on Lynn's motion *in limine*, that as the tapes were made surreptitiously, they were in violation of the Illinois Eavesdropping Act and not admissible in evidence. The state court also held that a minor has a right to privacy and that it was "not in the best interest of", and had a "coercive effect" on, a minor child to allow a parent secretly to record the child's conversations with the other parent.

Products v. Longview Fibre Co., 868 F.2d 908, 914, n.6 (7th Cir. 1989), "prospective impeachment" alone was sufficient to "preclude summary judgment" where, as here, the movant's witness's state of mind was at issue and the movant had the burden of proof.

Realizing on August 2 that they could not use the tapes, Respondents withdrew their objections to the settlement agreement.[4] During a prove-up hearing on August 5, the state court approved the original settlement agreement and Lynn agreed not to sue James for his taping the calls.[5]

After the August 5 prove-up, the Grant Respondents requested a release, releasing all claims against James and his attorneys and agents relating to the wiretapping. Lynn refused and agreed only to what was previously agreed to during the August 5 hearing, a covenant not to sue James. The Respondents also asked the state court to require such a release in the final order, but the court declined. Thus, Respondents knew, or should have known, that claims against them based on their disclosing the alleged contents of the tapes remained unimpaired.

The complaint alleges, *inter alia*, that Respondents were churning the state court litigation in order to enhance their legal and guardian fees;[6] and that Respondents acted with malice. It also alleges that in addition to mental anguish, Petitioners suffered actual damages of at

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[4] On August 2, Respondents obtained leave to file an immediate appeal from the ruling on the tapes, which they never pursued.

[5] During his state court deposition, on advice of his attorneys, the Grants, James invoked the 5th Amendment at least 75 times to avoid answering questions regarding the tapes.

[6] The GAL's fees for the period after execution of the June 19 settlement agreement were quadruple those for the period prior thereto. The Grant Respondents refused to produce documents relating to their fees, and James refused to produce his cancelled checks.

least $30,000 (in attorneys' fees and travel expenses) incurred after the June 19 settlement agreement was signed, all caused by Respondents' efforts to use the tapes to renege on the settlement.

REASONS FOR GRANTING THE WRIT

Presenting a Recurring Issue, the Court of Appeals' Decision is in Conflict with the Decisions of Other Courts of Appeals and the Plain Language of the Wiretap Act

Notwithstanding this Court's view that "Except as expressly authorized in Title III, . . . , all interceptions of wire and oral communications are flatly prohibited" and that "the victim of such interception, disclosure, or use is entitled to recover civil damages," *Gelbard v. United States*, 408 U.S. 41, 47, 92 S.Ct. 2357, 2360 (1972), the Seventh Circuit has denied three victims their right to sue under Title III. It did so by creating an exemption that is not "expressly authorized", is in direct conflict with decisions of other courts of appeals, and is contrary to the plain and unambiguous language of the Act, as well as its purpose. The Court of Appeals has, in short, transgressed Title III's "dual purpose" of "(1) protecting the privacy of wire and oral communications", Congress' "overriding . . . concern", and "(2) delineating on a uniform basis the circumstances and conditions under which the

interception of wire and oral communications may be authorized." *Gelbard, supra,* 92 S.Ct. at 2361.[7]

The decision below holds that an ex-husband and non-custodial parent can wiretap calls between his former wife (as well as her present husband) and the ex-spouses' minor child and use the tapped information in pending domestic relations litigation, when it is merely claimed that the wiretapper believed he was acting in the best interest of the child. (App. 12-13).

By accepting Respondents' concession that Title III "does not contain any sort of 'interspousal immunity' . . . . ", and that "[s]pying on your spouse to gain dirt for a divorce case is never within the ordinary course of a spouse's business", the Court of Appeals plainly – and appropriately – recognized that Title III does not permit domestic relations wiretapping. (App. 9). But it is a non-sequitur for the Court of Appeals to say then, based solely on such concession, that the "question of 'interspousal' exemption is not at issue" here. *Id.* It plainly is an issue here, for what the Court of Appeals gave with one hand, it took away with the other.

It is undisputed that the *same day* James made the second or last tape, he took it to his attorneys, the Respondents, and they, the very same day, used and disclosed it in an effort to renege on a signed settlement agreement in a pending state court action where the ex-

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[7] The Court of Appeals also overlooked its own prior recognition that "Title III implies that what is not permitted is forbidden. . . . " *United States v. Dorfman,* 690 F.2d 1230, 1233 (7th Cir. 1982).

spouses had been battling over child removal, custody, support payments and arrearages.

Thus, this case is factually no different from, but is in direct conflict with, decisions of the 4th, 6th, 8th, and 10th Circuits that a domestic relations exemption does not exist and cannot be implied under Title III. *See, Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991), *cert. denied.* ___ U.S. ___, 112 S.Ct. 1514 (1992); *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Platt v. Platt*, 873 F.2d 1447 (8th Cir. 1989); and *Bess v. Bess*, 929 F.2d 1332 (8th Cir. 1991). Other decisions are in conflict. *See, Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), upon which the Seventh Circuit does not rely, and *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), which carved out domestic relations exemptions.[8]

As stated concisely in *Heggy, supra*, 944 F.2d at 1539:

> After reviewing these authorities, and others, the district court below held that Title III, specifically 18 U.S.C. §2520 thereof, does apply to interspousal wiretaps. * * * We agree with the district court, and join the majority of federal circuit courts in holding that Title III does provide a remedy for such wiretapping. We believe this conclusion is compelled first and

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[8] The National Wiretap Commission termed the *Simpson* decision an "unexpected obstacle [. . .] in the path of law enforcement" in the prosecution of domestic relations wiretapping. *NWC Report* 24 (1976).

foremost by the clear and unambiguous language of the statute.

The opinion below seeks to avoid the core of the majority rule, granting its validity, but then asserting that the wiretapping here was expressly permitted under the so-called business-use extension telephone exemption. Thus, to deny Petitioners the protection of Title III, the Court of Appeals had to read the phrase "in the ordinary course of its business" in §2510(5)(a)(i) broadly to "lexical[ly] stretch" it to include the "business" of parenting, at least when the parent claims to act "out of concern for the child's well-being." (App. 11, 12-13). Significantly, too, it determined that committing what it conceded to be a crime and a tort under State law was "ordinary," and held that the lawyers involved were "immune" from the civil consequences of their nonetheless unlawful actions. This result must not be permitted to stand.

The Court of Appeals' decision conflicts directly with *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992), which held lawyers subject to liability for using, in custody proceedings, tapes of telephone conversations between the plaintiff-husband and his minor children, made by the wife during the pendency of divorce proceedings.[9]

In *Thompson*, a case which is factually indistinguishable from this one (except that here the eavesdropping

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[9] On remand, the defendant lawyers' motion for summary judgment was denied. *Thompson v.Dulaney*, 838 F. Supp. 1535 (D. Utah, 1993). In other domestic and non-domestic relations cases, lawyers have been held liable for using in court illegal tapes made by their clients. *United States v. Wuliger*, 981 F.2d 1497 (6th Cir. 1992); *Rodgers v. Wood*, 910 F.2d 444 (7th Cir. 1990).

occurred nine years after the parties were divorced), the court said (p. 748; some internal citations omitted):

> This statutory language, prohibiting "any person" from intercepting communications, is clear and broad. No language in the statute evidences a congressional intent to except tapping in this factual setting. *See Heggy*, 944 F.2d at 1540; *Kempf*, 868 F.2d at 972-73; *Pritchard*, 732 F.2d at 373; *Jones*, 542 F.2d at 667.
>
> Although resort to the legislative history is unnecessary in light of the unambiguous language of Title III, *see Pritchard*, 732 F.2d at 373, we reiterate *Heggy*'s characterization of that history as "evinc[ing] a congressional awareness of the widespread use of electronic eavesdropping in domestic relations cases and an intent to prohibit such eavesdropping." * * * First, remarks by Senator Long: " 'The three large areas of snooping in this [non-governmental] field are (1) industrial (2) divorce cases, and (3) politics. So far, we have heard no real justification for continuance of snooping in these areas.' " * * * Second, Professor Robert Blakey, "generally credited as the architect of Title III," testifying that: " 'private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation.' * * * ." Finally comments of Senator Hruska, a co-sponsor of the bill: " '[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations.' * * * "

The Court of Appeals' "broad reading" (App. 11, 12) of §2510(5)(a)(i), apart from being contrary to the general rule of statutory construction that express exemptions to

a remedial statute must be narrowly construed,[10] is plainly erroneous, as well as inconsistent with the majority rule.

First, since spousal wiretapping is expressly barred under Title III and no exemption can be implied – as the court below correctly recognizes – *a fortiori* it ought not be read into an express exemption under §2510(5)(a)(i). "[A]n interpretation of [a] statute which . . . would . . . render different sections inconsistent with each other cannot be the true one." *Perrine v. Chesapeake & Delaware Canal Co.*, 50 U.S. (9 How.) 172, 187 (1850, Taney, C.J.). Yet, that is precisely what the Court of Appeals did.

Second, the plain language of §2510(5)(a)(i) does not support the court's conclusion. "Ordinary", as in "ordinary course of its business", means "customary, usual, regular, normal". *Webster's New World Dictionary* (College Ed. 1968). No credible basis exists to believe that it is customary, usual, regular or normal for one parent secretly to record telephone conversations between a minor child and the other parent, even if the tapper believes that it is in the child's best interests. It is absurd to believe that an 11-year-old child – or any teenager – expects that his or her private telephone conversations with one parent will be monitored "normally or regularly" by the other parent. One need only talk to his or her teenage son or daughter to be disabused of that notion. Obviously, a parent speaking with her child does not believe that the other parent, especially when the

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[10] *Olsen v. Lake County, Inc.*, 955 F.2d 203, 206 (4th Cir. 1992); *Markowitz v. Northeast Land Co.* 906 F.2d 100, 105 (3rd Cir. 1990).

parents have long been divorced, will routinely and secretly monitor such phone calls.

Lynn, Ben's mother and legal custodian, certainly had a right of privacy in telephone conversations with him. Ben's affidavit shows that Lynn called him because she had learned that Ben was distressed by something his stepmother had done. Implicit in the decision below is that a father, ex-spouse and non-legal custodian has a Title III right, by merely asserting his belief that he acts in his child's best interest, to override the Title III right of the mother and legal custodian to speak in private with her child, at a time when she believes her call is in the child's best interest.

The fallacy of the Court of Appeals' interpretation is heightened by the generally accepted view – expressed by the state court here and by numerous others – that it is "coercive" and "contrary to a minor's best interests" for one parent secretly to record private conversations between the minor child and the other parent. *See, e.g., Harry R. v. Esther R.*, 134 Misc.2d 404, 510 N.Y.S.2d 792, 796 (1986); *In re Berk*, 70 A.D.2d 943, 417 N.Y.S.2d 785, 786 (1979); and *Pica v. Pica*, 70 A.D.2d 931, 417 N.Y.S.2d 528, 530 (1979).

When Congress uses the phrase "ordinary course of . . . business", words of art in statutes such as the Internal Revenue Code, it is meant to distinguish between commercial and personal matters. But even if "business" could include "parenting", the modifier "ordinary" begins the phrase. It requires an inference of language antithetical to the sense of the statute to believe that Congress ever contemplated, when it outlawed *all*

eavesdropping in domestic relations cases, that a parent may be in the business of normally, regularly, usually or customarily eavesdropping on private conversations between the other, adversarial parent and a minor child.[11]

Moreover, the Court of Appeals even actually assumed – correctly – that Respondents violated the Illinois Eavesdropping Act, 720 ILCS 5/14-1 *et seq.* (App. 15-16), and, therefore, Respondents and James committed a criminal act and a tort. *Petitioners submit that a person cannot be acting in the ordinary course of business if the act is criminal or a tort unless the person is regularly a criminal or a tortfeasor.* Clearly, Congress could not have had such "ordinary course of business" in mind.

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[11] The Court of Appeals failed to follow the rule frequently emphasized by this Court, that courts must presume that the "legislature says in a statute what it means and means in a statute what it says there", *Connecticut Nat'l Bank v. Germain*, ___ U.S. ___, 112 S.Ct. 1146, 1149 (1992); and that when "the terms of a statute [are] unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, ___ U.S. ___, 111 S.Ct. 599, 604 (1991). Contrariwise, the Court of Appeals has re-written the statute to give effect to what it considered was the "*probable* intent" of Congress, divined not affirmatively by what Congress said, but rather by the court's speculation as to what it said it "cannot attribute to Congress." (App. 12).

The speculative and legislative character of the decision below is also evidenced by the court's disposition of the state law claim, that respondents were absolutely immune from their assumed violation of the Illinois Eavesdropping Act. The court did not mention the brief of the Chicago Council of Lawyers, *amicus curiae*, which noted that: "There is no [statutory] provision [or common law basis] for immunity, absolute or qualified, in eavesdropping law."

Albeit in another context, Dean Prosser put it well:

> The standard of conduct required of a reasonable person may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community . . . W. Prosser and W. Keeton, *The Law of Torts* 220 (5th ed., 1984).

It cannot be "ordinary" to deviate from it.[12]

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[12] When the wiretap legislation was first considered in Congress, it included an unmodified prior authority exemption and an unmodified extension telephone exemption. *See,* Hearings before the Subcomm. on Crim. Laws and Proc. of the Senate Judiciary Committee re S. 2050, 90th Cong., 1st Session, 1001-002 (1967), dealing with 18 U.S.C. §2510 (8) and (9) (prior authority and extension telephone, respectively), reprinted in *Controlling Crime Through More Effective Law Enforcement,* U.S. Government Printing Office, 1967. Largely as a result of Professor Herman Schwartz' testimony for the A.C.L.U. in the House, the extension telephone exemption was sharply qualified in the Senate Judiciary Committee by "ordinary course of business" words of limitation. *See,* Hearings on the *Anti-Crime Program,* before Subcommittee No. 5 of the House Judiciary Committee, 90th Cong. 1st Sess. 989 (1967) (testimony of Professor Schwartz); Sen. Rep. No. 1097, 90th Cong. 1st Sess. 11-12 (1967) (§2510 (5) (extension telephone); §2511(2)(c) (prior authority).) As the result of the effort of Senator Hart, the prior authority provision was changed on the Senate Floor to "prior consent" and sharply qualified by words of limitation except "for the purpose of committing any criminal or tortious act in violation . . . of the laws . . . of any State or . . . any other injurious action." 114 Cong. Rec. 14694-95 (1968). Senator Hart explained his amendment: "[W]henever a private person acts in such situations with an unlawful motive, he will violate the criminal provisions of Title III and will also be subject to a civil

The decision below also conflicts with numerous courts of appeals' holdings that even when telephone calls are made in a *commercial* business setting, they may not be intercepted if, as here, they are *personal* and *private* calls.

> We hold as a matter of law that a telephone extension used without authorization or consent to surreptitiously record a *private* telephone conversation is not used in the ordinary course of business. This conclusion comports with the basic purpose of the statute, the protection of privacy . . .

United States v. Harpel, 493 F.2d 346, 351 (10th Cir. 1974) (emphasis added). Holding to the same effect are *Watkins v. L.M. Berry Co.*, 704 F.2d 577, 583 (11th Cir. 1983), *Epps v. St. Mary's Hospital of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986) and *Campiti v. Walonis*, 611 F.2d 387 (1st Cir. 1979). As stated in *Watkins, supra*, 704 F.2d at 583 (emphasis added):

> We hold that a *personal* call may not be intercepted in the ordinary course of business under the exemption in section 2510(5)(a)(i), except to the extent necessary to guard against

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suit. . . . For example, the secret consensual recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him." *Id.* The "other injury act" language was removed in 1986. Electronic Communications Privacy Act of 1986, 100 Stat. 1850 (1986). Under the Court of Appeals' decision, the "ordinary course of business" exemption for non-party consent interception will be broader than the one-party consent exemption, hardly a result consistent with the text of the statute or its legislative course of development.

> unauthorized use of the telephone or to determine whether a call is personal or not. In other words, a personal call may be intercepted in the ordinary course of business to determine its nature but never its contents.

James' affidavit states that he recorded Ben's calls with Lynn "to find out what Lynn was saying to Benjamin". From the "recordings" he allegedly "realized that [he] had been tricked into signing the Settlement Agreement". The calls were thus not only personal, but their recordation was directed and used against the ex-spouse in domestic relations litigation. The Court of Appeals' decision is plainly inconsistent with its recognition that "[s]pying on your spouse to gain dirt for a divorce case is never within the ordinary course of a spouse's business". (App. 9)

Further, the Court of Appeals has given subscribers of home phone extensions *greater* license under §2510(5)(a)(i) than business users. The latter must hang up when they learn the call is private or personal; the former is free to listen (except for the meaningless limitation of an assertion of a proper purpose).

Twice before this Court has denied certiorari in cases raising the domestic relations exception issue, one allowing spousal wiretapping, *Simpson, supra,* in 1974, one forbidding it, *Heggy, supra,* in 1992. These past denials have not resulted in uniformity by the lower federal courts under Title III.[13] The lower courts, moreover, are

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[13] See Comment, *Wiretapping & the Modern Marriage: Does Title III Provide a Remedy for Victims of Interspousal Electronic Surveillance,* 91 Dick.L.Rev. 855 (1990); Comment, *Interspousal*

facing "an avalanche of cases arising out of marital disputes." C. Fishman, *Wiretapping and Eavesdropping*, 201 (Cumulative Supp. 1991). The need for guidance by this Court is manifest.

Indeed, the court below has *expanded* the conflict by *extending* two decisions, *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991) and *Anonymous v. Anonymous*, 558 F.2d 677 (2nd Cir. 1977), both of which involved wiretapping by the *custodial* parent. *Newcomb* was expressly limited by two later Tenth Circuit decisions to actions *by a minor child* against his *custodial* parent, and would not preclude an action by a spouse or ex-spouse. See, *Heggy v. Heggy*, 944 F.2d 1537 (1991) and *Thompson v. Dulaney*, 970 F.2d 744 (1992). Suggesting that the Tenth Circuit "may have misread" its own opinions (App. 11, fn.3), the Seventh Circuit ignored the expressed limitations on *Newcomb*. Here, Petitioners include the *custodial* mother and her present husband and the Respondents are not the father but his attorneys and the GAL.

Anonymous, inconsistent with most of the courts of appeals that have considered "interspousal immunity", is also factually limited to wiretapping by the *custodial* parent in his home where the minor child resided. Although

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Wiretapping, etc., 28 J.Fam.Law 771 (1990), cited *infra*, p. 24; ANNOTS., 55 ALR Fed. 936 (1981), 58 ALR Fed. 594 (1982), 25 ALR Fed. 759 (1975), and 49 ALR (4th) 430 (1986); and *Heggy, supra*, 944 F.2d at 1539, fn.3.

Anonymous[14] and *Newcomb* are unsound and distinguishable, no justification whatsoever exists for expanding the exemption to a non-custodial parent.

The Court of Appeals also overlooked the constitutional implications of denying privacy rights of minors[15] and that minors have other rights, including rights against a parent who harms them.[16]

The current need for certiorari is also heightened by certain statistical facts of our national life. One of the major areas of wiretapping abuse that Congress intended to bar under Title III was in connection with domestic relations surveillance. Since that time, as everyone knows, the divorce rate has skyrocketed. In 1970 the number of people divorced was 4.3 million; in 1993 the number almost quadrupled to 16.7 million.[17] In 1960, eight years before Title III was enacted, less than "1% of

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[14] In contrast to the Tenth Circuit's restrictions on *Newcomb*, the Second Circuit has re-affirmed *Anonymous* in *Janecka v. Franklin*, 843 F.2d 110 (2nd Cir. 1988).

[15] See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1978); and *Carey v. Population Services International*, 431 U.S. 678 (1977).

[16] In *In re E.G.*, 133 Ill.2d 98, 549 N.E.2d 322 (1989), the Illinois Supreme Court held that a minor has a common law right to refuse medical treatment and noted this Court's holdings that minors have constitutional rights to privacy, freedom of expression, freedom from unreasonable searches and to procedural due process. 549 N.E.2d at 326. Minors may sue other persons, even their parents, for torts or malicious acts. See, M. Guggenheim & A. Sussman, *The Rights of Young People* (ACLU Handbook, Bantam Books, 1985) pp. 170 *et seq.*

[17] Census Bureau, "Marital Status & Living Arrangements," as reported in the *New York Times*, July 20, 1994, pp. A1 and A7.

children under 18 were experiencing the divorce of their parents". By 1990, it was "almost 50%".[18] Accordingly, it is not surprising that in divorce and child custody proceedings:

> Over the past several decades the use of electronic surveillance, including wiretapping, has increased at an alarming rate. . . . Comment, *Interspousal Wiretapping: Defining "Marital Home" For Purposes Of Civil Recovery Under Title III*, 28 J.Fam.Law 771 (1990).

CONCLUSION

Petitioners respectfully submit that it is time for this Court to answer the Title III issues raised by this and prior cases, to grant the Writ and upon review, reverse the Court of Appeals.

Respectfully submitted,

JACK JOSEPH
MICHAEL P. MYERS
JOSEPH AND MYERS
33 North Dearborn Street
Suite 1410
Chicago, Illinois 60602
(312) 346-9887

AARON S. WOLFF
Counsel of Record
33 North Dearborn Street
Suite 1410
Chicago, Illinois 60602
(312) 346-3461

G. ROBERT BLAKEY
Notre Dame Law School
Notre Dame, Indiana 46656

(219) 631-5717

Attorneys for Petitioners

Dated: August 10, 1994

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[18] Carnegie Corporation Report and other sources as reported in the *New York Times*, April 12, 1994, pp. A1 and A11.

In the
United States Court of Appeals
For the Seventh Circuit

No. 93-1880

LYNN A. SCHEIB, BENJAMIN GROSSE, a minor, by LYNN ANN SCHEIB, his next friend and CARL SCHEIB,

Plaintiffs-Appellants,

v.

JOAN C. GRANT, BURTON F. GRANT, and DOROTHY B. JOHNSON,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 513 – **Marvin E. Aspen,** *Judge.*

ARGUED DECEMBER 1, 1993 – DECIDED APRIL 15, 1994

Before WOOD, JR., EASTERBROOK and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The plaintiffs, Lynn Scheib, her husband Carl Scheib, and her son Benjamin Grosse, brought this action pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-2521, and the Illinois Eavesdropping Statute, 720 ILCS 5/14-1 *et seq.* Defendants Joan and Burton Grant had served as the attorneys of Lynn Scheib's former husband and Benjamin Grosse's father, James Grosse,

during custody proceedings in Illinois state court. Defendant Dorothy Johnson had served as Benjamin Grosse's guardian ad litem ("GAL"). The district court granted summary judgment for the defendants. For the reasons that follow, we affirm.

I

BACKGROUND

A. *Facts*

Lynn Scheib and James Grosse were divorced in 1982. Lynn had been granted sole custody of their son, Benjamin Grosse. Mr. Grosse had visitation privileges. In January 1991, Lynn informed James that she intended to marry Carl Scheib and move to Pennsylvania, and that she planned to take eleven year-old Benjamin with her. As a result, James contacted his attorneys, Joan and Burton Grant, who filed an emergency motion for injunctive relief in Illinois state court to prohibit Benjamin's removal without a proper proceeding. Following litigation and negotiation, the parties, including the court-appointed GAL, Dorothy Johnson, reached a written settlement. The parties agreed that Benjamin could move with Lynn to Pennsylvania, but that James would have extended summer and holiday visitation rights. Although all parties signed the settlement on June 19, 1991, it was subject to court approval. While awaiting that approval, Lynn moved to Pennsylvania, and Benjamin stayed with James in Illinois, where Benjamin was to stay as part of James' visitation rights until August 5, 1991.

While staying in Illinois with his father, Benjamin made telephone calls to, and received telephone calls

from, his mother Lynn. According to James, on more than one occasion, Benjamin became upset and emotional after speaking with his mother. As a result, James decided to find out what was being said between Lynn and Benjamin in these calls. Unbeknownst to either Benjamin or Lynn, James used a telephone answering machine attached to an extension to record at least two conversations between Benjamin and Lynn. Because, as James tells it, the tapes of those conversations revealed that Lynn was causing emotional harm to Benjamin, he took them to his attorneys, Joan and Burton Grant. According to Joan Grant, she agreed with James that the tapes showed that harm was being done to Benjamin, and therefore informed the GAL of the tapes' contents.

After learning of the existence and content of the tapes from James' attorneys, Lynn's attorneys filed a motion in limine on July 24, 1991 to prevent James or the GAL from introducing the tapes at the hearing on the removal settlement. On August 2, 1991, the state court granted Lynn's motion in limine, apparently because the tapes were made in violation of the Illinois Eavesdropping Statute. The court's ruling was never issued as a written order because, after the court's oral ruling, the parties and the court agreed that the court would enter the removal settlement as an agreed order. Such an order was issued on August 5, 1991. Before the state court entered the settlement order, however, it asked Lynn whether she planned to bring a lawsuit against James in connection with the tapes. She stated that she would not bring such a lawsuit against James and, indeed, she did not do so. Instead, she filed this action against James' attorneys, Joan and Burton Grant, and against Benjamin's

GAL, Dorothy Johnson. The complaint alleged violations of Title III, 18 U.S.C. §§ 2510-2521, and the Illinois Eavesdropping Statute, 720 ILCS 5/14-1 *et seq.*

B. *District Court Proceedings*

In resolving Joan and Burton Grant's motion for summary judgment, the district court first addressed Title III, the federal wiretapping statute. The court stated that, if the facts at issue had presented a scenario of so-called "interspousal" wiretapping, i.e., if the facts showed James to have recorded the conversations to obtain information about Lynn, the plaintiffs' federal wiretapping cause of action would have had merit under the caselaw of a majority of the courts of appeals. *See, e.g., Heggy v. Heggy,* 944 F.2d 1537, 1538-41 (10th Cir. 1991) ("We hold that Title III does apply to interspousal wiretapping within the marital home."), *cert. denied,* 112 S. Ct. 1514 (1992). However, the district court stated that the "undisputed facts" in this case demonstrated that the tapes James made of telephone conversations between Benjamin and Lynn presented the court "with a parent who recorded the conversations of a minor child while the child resided in the parent's home." *Scheib v. Grant,* 814 F. Supp. 736, 739 (N.D. Ill. 1993). The only question before the district court, then, was whether Title III should apply to such a situation.

Relying upon Second and Tenth Circuit cases, the district court stated that the statute's exemption for phone extensions used by a "subscriber or user in the ordinary course of its business" applies to the home as well as the marketplace. *See* 18 U.S.C. § 2510(5)(a)(i);

Newcomb v. Ingle, 944 F.2d 1534 (10th Cir. 1991) (holding that "a custodial parent tapping a minor child's conversations within the family home" is "permitted by a broad reading of the exemption contained in § 2510(5)(a)(i)"), *cert. denied*, 112 S.Ct. 903 (1992); *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977) (same). Thus, the district court held that James' recording of Benjamin's conversations was exempted from Title III. As a result, no unlawful use or disclosure violation could be established against Joan and Burton Grant or Dorothy Johnson.

The district court then turned to the plaintiffs' claim that the defendants had violated the Illinois Eavesdropping Statute, 720 ILCS 5/14-1 *et seq.*[1] Assuming *arguendo* that the defendants had violated the statute, the district court held that, because the defendants' disclosure of the tapes' contents was "intimately associated" with the state court proceedings, the defendants were entitled to absolute immunity under Illinois law. *Scheib*, 814 F. Supp. at 740. The need for advocates to press vigorously their clients' cases in court without fear of a lawsuit, the district court stated, was too great not to grant absolute immunity for judicially-related disclosures. The district court therefore granted Joan and Burton Grant's motion for summary judgment, and sua sponte granted summary judgment in favor of the GAL, Dorothy Johnson.

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[1] The district court possessed federal jurisdiction over the Illinois state law claim even after disposing of the federal Title III claim because diversity jurisdiction existed pursuant to 28 U.S.C. § 1332(a)(1). *See Scheib*, 814 F. Supp. at 740 n.2.

II

DISCUSSION

On Appeal, the plaintiffs submit two issues for review. First, the plaintiffs assert that Title III admits of no exceptions applicable to this case. Therefore, they contend, James' activity violated the statute, regardless of whether that activity was motivated by a concern for Benjamin's welfare or by a desire to obtain unfavorable information about his former wife Lynn. The plaintiffs argue in the alternative that, even if there is an exception in the statute for attending to a child's welfare, an issue of triable fact exists in this case concerning the impetus behind James' taping. Second, the plaintiffs contend that the district court erred in concluding that the defendants were entitled to absolute immunity in this case and thus could not be held liable under the Illinois statute. We now review the district court's decision de novo to determine whether any genuine issue of material fact exists and whether the defendants were entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In so doing, we must take all facts in the light most favorable to the plaintiffs. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. *Title III*

Section 2511 of Title III states in part that, except as provided elsewhere in the chapter, any person who:

> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a

> wire, oral, or electronic communication in violation of this subsection; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; shall be punished as provided in subsection (4) or shall be subject to suit as provide in subsection (5).

18 U.S.C. § 2511(c) & (d). Title III provides a private cause of action in 18 U.S.C. § 2520, which provides in part:

> Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

In short, using or disclosing information one had reason to know was obtained originally in violation of Title III is actionable under the statute. Title III, however, contains an extension phone exemption, which is set out in 18 U.S.C. § 2510:

> (5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral or electronic communication other than – (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the

> subscriber or user in the ordinary course of its business. . . .

The issue in this case is not whether the defendants' activities fall under 18 U.S.C. § 2511(c) & (d), but rather whether James' conduct in taping the conversations between Benjamin and Lynn was exempted from Title III by virtue of the extension phone exemption of 18 U.S.C. § 2510(5)(a)(i).

The plaintiffs submit that § 2510(5)(a)(i)'s extension phone exemption is not applicable to James' conduct. They assert that it makes no difference whether the taping is characterized as directed at Lynn or as motivated by Benjamin's welfare. The exception contained in § 2510(5)(a)(i) is simply inapplicable. First, if the taping is considered as directed at Lynn, the plaintiffs state that a majority of the circuits that have addressed the issue have held that there exists no "interspousal" exemption from the strictures of Title III.[2] The plaintiffs reason that no

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[2] *See Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991) (holding that "Title III does apply to interspousal wiretapping within the marital home"), *cert. denied*, 112 S. Ct. 1514 (1992); *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989) (holding that "the conduct of a spouse in wiretapping the telephone communications of the other spouse within the marital home, falls within [Title III's] purview"); *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984) (stating that there is "no indication in the statutory language or in the legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping"); *United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976) (holding that "the plain language of [§ 2511] and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps"). *But see Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir.) ("The naked language of Title III, by

exemption can therefore be found in a case like this one which involves ex-spouses. The defendants concede that the statute does not contain any sort of "interspousal immunity." Therefore, the question of any kind of "interspousal" exemption is not at issue. *See* Appellees' (Grants) Br. at 11 (conceding that "[s]pying on your spouse to gain dirt for a divorce case is never within the ordinary course of a spouse's business").

Second, with respect to taping directed at Benjamin out of concern for his welfare, the plaintiffs state that the same reasoning supporting the absence of an "interspousal" exemption ought to control cases in which a party tapes the telephone conversations of any other person within the home, even a child not of majority age. In support of this contention, the plaintiffs submit that the language in the § 2510(5)(a)(i) exemption (which states Title III does not extend to instruments "a subscriber or user" employs "in the ordinary course of its business") does not apply outside the confines of strictly commercial activity. "Business," the plaintiffs submit, "means business." Further, the plaintiffs maintain that the cases which have construed the exemption in § 2510(5)(a)(i) to apply to situations in which a parent has recorded phone conversations of his or her child are distinguishable. In this regard, they point out that in both *Newcomb v. Ingle*,

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virtue of its inclusiveness, reaches this case. However, we are of the opinion that Congress did not intend such a far-reaching result, one extending into areas normally left to states, those of the marital home and domestic conflicts."), *cert. denied*, 419 U.S. 897 (1974).

944 F.2d 1534 (10th Cir. 1991), and *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), the parent recording the minor's conversations had custody of the child, unlike James, with whom Benjamin was only visiting. In any event, the plaintiffs assert, both cases were wrongly decided.

We cannot accept the plaintiffs' argument. At the outset, we note that, although the defendant-parent in both *Newcomb* and *Anonymous* had custody of the child whose conversations the parent recorded, we do not read either case as making the precise nature of the parent's custodial status a factor, much less outcome-determinative, in the decision. Rather, both cases focus on the extension phone exemption of § 2510(5)(a)(i) and the need for parents with whom a minor child is living to obtain information concerning that child's welfare. In *Anonymous*, the defendant-father had tape-recorded telephone conversations between his daughter, who was living with him at the time, and his estranged wife. The Second Circuit affirmed the dismissal of the wife's Title III action because the father's activities fell within § 2510(5)(a)(i)'s exemption: "Such a use of an extension phone in appellee's own home would certainly be in the 'ordinary course of [the user's] business.' " *Id.* at 678-79; *see also Janecka v. Franklin*, 843 F.2d 110, 111 (2d Cir. 1988) (per curiam) (affirming validity of *Anonymous* where defendant-father claimed he recorded mother-daughter phone conversations out of concern for daughter's welfare).

Similarly, in *Newcomb*, the Tenth Circuit affirmed summary judgment entered against a plaintiff-son who had brought a Title III action against his mother. She had

recorded conversations between him and his father when he was living with his mother as a minor; the recordings had revealed that the son's father, the mother's ex-husband, had instructed the son to set fire to his mother's home. *Newcomb*, 944 F.2d at 1535. The court stated that the "interception of a family member's telephone conversations by use of an extension phone in the family house is arguably permitted by a broad reading of the exemption contained in 18 U.S.C. § 2510(5)(a)(i)." *Id.* at 1536. The court continued:

> There is no persuasive reason why Congress would exempt a business extension and not one in the home. The difference between listening on the extension and tapping the line within the home in the context here is not material. "[W]e think the (5)(a)(i) exemption is indicative of Congress's intention to abjure from deciding a very intimate question of familial relations, that of the extent of privacy family members may expect within the home vis-a-vis each other."

Id. (citation omitted).[3]

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[3] We note that cases subsequent to *Newcomb* appear to create an ambiguity with respect to the contours of the rule in the Tenth Circuit. The source of that ambiguity is *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992). In *Thompson*, the court appeared to limit the principle announced in *Newcomb* on the basis of the plaintiff's identity: "We distinguish *Newcomb* as did *Heggy* by noting that in *Newcomb* it was a minor child living at home at the time of the wiretap who was complaining, whereas here, as in *Heggy*, it is the spouse who is complaining." *Id.* at 747 n.4. It appears that the *Thompson* panel may have misread the earlier decision in *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991). *Heggy* concerned interspousal wiretapping and, in the course of its discussion, the court reiterated the *Newcomb* holding and

In our view, the plaintiffs have presented no persuasive reason why we ought to depart from the reasoning of the other circuits. The language of § 2510(5)(a)(i) juxtaposes the terms "subscriber" and "user" with the phrase "in the ordinary course of its business." Although the latter phrase might be used to distinguish commercial life from personal life, in the context presented here, it must be read in conjunction with the terms "subscriber" and "user." These terms certainly do not have exclusively market-oriented connotations. Reading this extension phone exemption as a whole, then, it is no lexical stretch to read this language as applying to a "subscriber's" conduct – or "business" – in raising his or her children. Congress might have spelled out in more precise detail the contours of the extension phone exemption; but its failure to do so does not relieve us of the obligation to give the statute a reading consistent with the probable intent of the legislature. We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations

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then distinguished it by stating that "the type of situation addressed in this opinion is 'qualitatively different from a custodial parent tapping a minor child's conversations within the family home.' " *Id.* at 1538 n.1 (quoting *Newcomb*, 944 F.2d at 1535-36). As far as we are able to ascertain, the Tenth Circuit has not overruled *Newcomb*. Because we believe that *Newcomb* is correctly decided and is in agreement with the decisions of the Second Circuit in *Anonymous* and *Janecka*, 843 F.2d at 111 (affirming dismissal of Title III claim brought by ex-spouse of defendant where defendant claimed concern for child motivated taping), we shall not presume that *Newcomb* is no longer the law of the Tenth Circuit.

out of concern for the child's well-being. As Judge Anderson stated in *Newcomb*, there is simply no reason why Congress would grant such an exemption to commercial but not domestic subscribers. *Id.*[4]

In the alternative, the plaintiffs submit that, even if § 2510(5)(a)(i) covers a situation in which a parent tapes a child's phone conversations out of concern for the child's welfare, there exists in this case a genuine issue of material fact as to whether concern for Benjamin's welfare was in fact James' purpose in taping the phone conversations between Benjamin and Lynn. The plaintiffs submit that a jury ought to decide whether James recorded the telephone conversation because of a concern for Benjamin, or because of a desire to obtain negative information about his ex-wife Lynn. *Cf. Thompson v. Dulaney*, 838 F. Supp. 1535, 1545 (D. Utah 1993) (stating that "there is a fact question as to what [defendant-mother's] 'purpose' was in intercepting the conversations").

The burden of establishing a matter of intent is always difficult. We therefore approach the matter of summary judgment carefully in such cases. *See Bronze Shield, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1087 (3d Cir. 1981) (stating that because intent is "difficult to establish, summary judgment should be granted with

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[4] We note that the Supreme Court has refused to read a requirement of economic or profit-seeking activity into a statute absent clear language to that effect. *See National Organization of Women v. Scheindler*, 114 S. Ct. 798, 806 (1994) (holding that the unambiguous language of the RICO statute does not require a racketeering enterprise or racketeering predicate acts to be accompanied by an economic motive).

caution"), *cert. denied*, 458 U.S. 1122 (1982). Nonetheless, we have made clear that "[s]ummary judgment will not be defeated simply because issues of motive or intent are involved, and is proper when the plaintiff fails to indicate any motive or intent to support plaintiff's position." *Morgan v. Harris Trust & Sav. Bank*, 867 F.2d 1023, 1026 (7th Cir. 1989). Here, the defendants have submitted evidence tending to show that James' concern for Benjamin was based on information that the child's conversations with his mother were the source of his becoming upset.[5] Under these circumstances, the plaintiffs had to do more to avoid summary judgment than to point out that Lynn was on the other line every time James recorded Benjamin's calls. Accordingly, we hold that James Grosse did not violate Title III in recording Benjamin's conversations

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[5] The defendants submitted the affidavit of James Grosse. In it, he states that Benjamin became "extremely upset" and "experienced . . . traumatic episodes following conversations with Lynn. Each time, Benjamin would react negatively and become anti-social. . . . Never before had he cried so or refused to talk with me or the family. I became even more concerned when I realized Benjamin reacted this way only after he spoke with Lynn." R.40, Exh.1, ¶¶ 11-14. Benjamin himself states in an affidavit that he was "angry" and "upset" and cried after speaking with his mother on different occasions. R.56, Exh.2, ¶ 8. It is true that Benjamin also states that, although he was emotional after speaking with his mother, it was not those conversations that were upsetting him. However, insofar as James Grosse's motivations are concerned, the appearance that Benjamin was troubled after speaking with his mother is what is important. There is no evidence in the record that Benjamin explained the underlying causes of his behavior to his father at the time of the events at issue.

with Lynn. As a result, no unlawful use or disclosure violation can be established against the defendants.[6]

B. *Illinois Eavesdropping Statute*

The plaintiffs also alleged that the defendants violated the Illinois Eavesdropping Act, 720 ILCS 5/14-1 *et seq.* The statute states that a "person commits eavesdropping when he . . . [u]ses or divulges . . . any information which he knows or reasonably should know was obtained through the use of an eavesdropping device." 720 ILCS 5/14-2(b). The district court assumed *arguendo* that the defendants had violated the statute. Nonetheless, it held that, because the defendants' activities were "intimately associated" with ongoing judicial proceedings, the defendants were entitled to absolute immunity.

The plaintiffs submit that the district court erred in granting attorneys Joan and Burton Grant and GAL Dorothy Johnson absolute immunity, regardless of whether their conduct was intimately associated with the state court removal proceedings. At most, they state, the defendants were entitled to qualified immunity. The defendants, on the other hand, contend that the long-standing common law protection afforded to attorneys' statements and conduct closely associated with judicial proceedings required the district court to grant the defendants nothing less than absolute immunity. We conclude

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[6] In light of our holding, we need not address the defendants' arguments concerning whether James had authority to consent vicariously for Benjamin, and whether Title III applies to recordings of conversations which take place on cordless telephones.

that the district court did not err in holding the defendants absolutely immune from damages liability under the Illinois Eavesdropping Statute for using or divulging the tape recorded conversations in a manner intimately associated with the state court removal proceeding.

With respect to James' attorneys, Joan and Burton Grant, we begin with "the oft-stated principle in Illinois that anything said or written in a legal proceeding . . . is protected by an absolute privilege against defamation actions, subject only to the qualification that the words be relevant or pertinent to the matters in controversy." *Defend v. Lascelles*, 500 N.E.2d 712, 714 (Ill. App. 1986); *see also Libco Corp. v. Adams*, 426 N.E.2d 1130, 1131 (Ill. App. 1981) ("The absolute privilege protects anything said or written in a legal proceeding."). The public policy concern underlying the rule prohibiting defamation actions against attorneys arising out of statements or conduct with "some relation" to a judicial proceeding is straightforward: "[I]t is uniformly recognized that the judicial system would be best served if persons with knowledge of relevant facts could report those facts to the court without fear of civil liability." *Defend*, 500 N.E.2d at 714. The attorney in such a situation " 'is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation.' " *Thomas v. Petrulis*, 465 N.E.2d 1059, 1061 (Ill. App. 1984) (citation omitted); *see also Defend*, 500 N.E.2d at 716 (stating that the "significant interest" involved is the "facilitati[on] of the truth-seeking process"). This absolute privilege is afforded even when malice is assumed to have motivated the attorney. *Id.* at 716-17.

We believe that, if the matter were presented to them today, the Justices of the Supreme Court of Illinois would conclude that the same policy concerns that animate the common law rule prohibiting defamation actions for statements made in relation to a judicial proceeding ought to apply to actions brought under the Illinois Eavesdropping Statute against attorneys who use or disclose information in a manner intimately associated with an ongoing judicial proceeding. We believe that the Illinois Court would conclude that the truth-seeking process of a judicial proceeding will be most securely advanced if attorneys do not fear civil or criminal liability as the consequence of misjudging the legality of disclosing particular information.

We cannot accept the plaintiffs' contention that giving attorneys such absolute immunity "would immunize an attorney's destruction of evidence or elimination or concealing of a material witness so long as the motivation was to help the client." Appellants' Br. at 46. So long as absolute immunity is extended only to the attorneys' statements or conduct closely related to ongoing judicial proceedings, courts will be able to police attorney behavior that civil actions will not be able to reach. As the district court stated, courts have sufficient tools, such as the suppression of evidence and disciplinary sanctions, to guard against abusive conduct that takes place in the confines of a judicial proceeding. *Cf. Auriemma v. Montgomery*, 860 F.2d 273, 278-79 (7th Cir. 1988) (declining to extend absolute immunity to attorneys' extrajudicial investigation because such an investigation is not subject to judicial safeguard and protections), *cert. denied*, 492 U.S. 906 (1989). In this regard, we note that "there is no

'professional responsibility tort' in Illinois." *Zanders v. Jones*, 680 F. Supp. 1236, 1239 (N.D. Ill. 1988) (refusing to recognize cause of action against attorney for violation of Illinois Code of Professional Responsibility), *aff'd without op.*, 872 F.2d 424 (7th Cir. 1989). "The Illinois courts have refused . . . attempts to extend tort liability for conduct in the course of a legal proceeding." *Id.* Because the record indicates that neither Joan nor Burton Grant made any extrajudicial disclosure of the recorded conversations, but rather disclosed portions of the recordings only to persons intimately involved in the ongoing state court litigation, they were entitled to absolute immunity.[7]

With respect to Benjamin's GAL, Dorothy Johnson, we conclude that she too was entitled to absolute immunity. Although no Illinois case has addressed the issue of immunity with respect to a GAL's conduct in a judicial proceeding, state courts which have addressed the general issue of GAL immunity have granted GALs absolute immunity.[8] Those courts reasoned that, absent absolute

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[7] The district court stated in its opinion that "the Grants and Dorothy Johnson disclosed alleged portions of the tape recordings to each other, to other persons and to Judge Moshe Jacobius." *Scheib*, 814 F. Supp. at 738. We do not know to whom the district court was referring in stating that the defendants disclosed the content of the tapes to "other persons." The record is devoid of any evidence indicating that the defendants made disclosures to anyone but the court, opposing counsel, and each other, and the plaintiffs conceded as much at oral argument. We emphasize that there is absolutely no allegation in the case that the attorneys directed or even advised James Grosse to tape the conversations.

[8] *See, e.g., Bird v. Weinstock*, 864 S.W.2d 376, 383 (Mo. App. 1993) (granting court-appointed GAL absolute immunity for

immunity, the specter of litigation would hang over a GAL's head, thereby inhibiting a GAL in performing duties essential to the welfare of the child whom the GAL represents. We believe that the Illinois Supreme Court would find this reasoning persuasive and grant a court-appointed GAL absolute immunity from lawsuits arising out of statements or conduct intimately associated with the GAL's judicial duties. In this case, the record reflects that Dorothy Johnson, who was appointed by the court to serve as Benjamin's GAL, merely listened to portions of the tape after being informed by James' attorneys, the Grants, that the tapes concerned Benjamin's well-being, and later opposed the motion in limine to exclude the tapes from the removal proceedings. Conduct so closely related to a GAL's judicial duties cannot form the basis of a lawsuit if GALs are to continue to apprise courts of all relevant information concerning the GAL's ward.

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actions undertaken in the judicial process); *Collins v. Tabet*, 806 P.2d 40, 44 (N.M. 1991) (holding that "a [GAL], appointed in connection with court approval of a settlement involving a minor, is absolutely immune from liability for his or her actions taken pursuant to appointment"); *Penn v. McMonagle*, 573 N.E.2d 1234, 1237 (Ohio App. 1990) (holding that GAL "is entitled to absolute immunity from actions arising out of the performance of her duties as [GAL]"; *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988) (same); *see also Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) ("a failure to grant [absolute] immunity would hamper the duties of a [GAL] . . . in judicial proceedings.").

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Lynn Ann SCHEIB, Benjamin Grosse, a minor, by Lynn Ann Scheib, his next friend, and Carl Scheib Plaintiffs,

v.

Joan C. GRANT, Burton F. Grant, and Dorothy B. Johnson, Defendants.

No. 92 C 0513.

United States District Court, N.D. Illinois, E.D.

Feb. 10, 1993.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

Plaintiffs Lynn Ann Scheib, Benjamin Grosse (a minor) and Carl Scheib bring this two-count complaint against Joan C. Grant, Burton F. Grant and Dorothy B. Johnson, alleging violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521, and of the Illinois Eavesdropping Statute, Ill.Rev.Stat. ch. 38, ¶ ¶ 14-1 *et seq.* Presently before the court is Joan and Burton Grant's motion for summary judgment. For the reasons set forth below, we grant the Grants' motion for summary judgment. Additionally, we *sua sponte* grant summary judgment on behalf of defendant Dorothy B. Johnson.[1]

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[1] The Grants also have filed motions to strike the affidavits of Benjamin Grosse and Peter T. Wolff, filed in opposition to the motion for summary judgment. In that the substance of these affidavits do not create issues of material fact sufficient to

I. Summary Judgment Standard

Under the Federal Rules of Civil Procedure, summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). This standard places the initial burden on the moving party to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Rule 56(c)). Once the moving party has done this, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, the court must read all facts in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); *Griffin v. Thomas*, 929 F.2d 1210, 1212 (7th Cir. 1991).

II. Background

This action stems from a removal and custody proceeding before Judge Moshe Jacobius of the Circuit Court of Cook County. After her divorce from James Grosse in 1982, plaintiff Lynn Scheib was granted sole custody of their son, Benjamin Grosse. In January of 1991, Lynn Scheib informed her former husband, James Grosse, that

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withstand the instant motion for summary judgment, we summarily deny the motions to strike.

she intended to remarry and, consequently, planned to move their son Benjamin from Illinois to Pennsylvania. Recognizing the need for modify the existing visitation schedule, and hoping to avoid filing a formal removal petition, Lynn proposed to James terms for a new visitation schedule. However, neither James Grosse nor his attorneys, defendants Joan and Burton Grant, responded to Lynn's proffered resolution. Rather, on February 11, 1991, James Grosse filed in the Circuit Court of Cook County an emergency motion for injunctive relief, seeking to prohibit removal of Benjamin pending a proper removal proceeding. Subsequent to James Grosse's request for injunctive relief, Lynn filed a petition for removal. James countered with a motion to strike the petition and a cross petition for custody. Defendant Dorothy Johnson was appointed as Benjamin's guardian ad litem ("GAL") in connection with the custody and removal proceeding.

After lengthy negotiation, the parties reached a global settlement, such agreement reduced to writing and signed by all parties on June 19, 1991. However, rather than immediately entering judgment based on the settlement agreement, Judge Jacobius scheduled a prove-up hearing. In the interim and pursuant to the settlement agreement, Lynn Scheib left Illinois for Pennsylvania. Benjamin remained in Illinois with James Grosse, with whom Benjamin was scheduled to reside until approximately August 5, 1991.

During his residence with his father, Benjamin received calls from, and placed calls to, his mother, Lynn Scheib. In at least 60 to 75% of these conversations, Benjamin used a cordless phone in James Grosse's house. At

the time, James Grosse had three telephones in his home. According to James, Benjamin became very upset after several conversations with his mother. Thus, using a telephone answering machine attached to an extension phone, James Grosse recorded at least two conversations between Benjamin and Lynn. James Grosse did not overhear these conversations at the time they occurred, but subsequently heard their content by listening to the recordings after the fact. Claiming that the tapes prove that Lynn Scheib was the cause of Benjamin's emotional distress, James Grosse took the tapes to Joan Grant for legal advice. After listening to the tapes, Joan Grant purportedly formed the opinion that Benjamin's welfare was in jeopardy. As such, she promptly informed Benjamin's GAL, Dorothy Johnson, of the tapes' content.

On July 24, 1991, Lynn Scheib filed a motion in limine in the Circuit Court of Cook County to prevent James Grosse, his attorneys and the GAL from introducing the tape recordings at the prove-up hearing. The Grants, as attorneys for James Grosse and the GAL opposed the motion and vigorously sought to have the tapes allowed into evidence. Prior to, and in connection with, the motion in limine, the Grants and Dorothy Johnson disclosed alleged portions of the tape recordings to each other, to other persons and to Judge Moshe Jacobius. On August 2, 1991, Judge Jacobius granted the motion in limine, seemingly on the basis that the recordings violated the Illinois Eavesdropping Statute. However, the ruling was never incorporated into a formal written order, as the parties had reached settlement regarding the underlying case. On August 5, 1991, Judge Jacobius entered an agreed order, retroactive to June 19, 1991,

resolving all underlying issues in the custody and removal action. Before entering this order, Judge Jacobius conducted a prove-up hearing, at which Lynn Scheib was asked and answered:

> Q. One more just to make it crystal clear. You have no intention of today or in the future doing anything or having anyone on your behalf do anything to criminally or civilly prosecute Mr. Grosse for any alleged matters in connection with any tape recordings that may have been made as a result of these proceedings?
>
> A. No. I'm not going to prosecute Jim.
>
> Q. And you don't intend to have anyone else prosecute him. Is that your intention?
>
> A. Nobody is going to prosecute Jim.

True to her word, Lynn Scheib did not "prosecute" James Grosse in connection with the tape-recorded conversations. Rather, she, Benjamin Grosse and Carl Scheib filed this civil action against James Grosse's attorneys, Joan and Burton Grant, and Dorothy Johnson, alleging violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-2521, and of the Illinois Eavesdropping Statute, Ill.Rev.Stat. ch. 38, ¶ ¶ 14-1 *et seq.*

III. Discussion

A. Title III

Title III prohibits any person from "intentionally disclosing[ing], or endeavor[ing] to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the

information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c) (Supp.1992). A civil cause of action is provided under 18 U.S.C. § 2520, which states in part: "Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate."

Portraying the recorded conversations as "interspousal wiretaps," plaintiffs contend that Title III provides them with a federal remedy against the Grants and Johnson. Indeed, the majority of courts addressing the issue have held that, in the absence of an explicit exception for electronic surveillance by one spouse directed against another, Title III reaches interspousal wiretapping. *See Heggy v. Heggy*, 944 F.2d 1537, 1538-41 (10th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992); *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir.1989); *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir.1984); *United States v. Jones*, 542 F.2d 661, 673 (6th Cir.1976); *Heyman v. Heyman*, 548 F.Supp. 1041, 1044-47 (N.D.Ill.1982). *But see Simpson v. Simpson*, 490 F.2d 803, 810 (5th Cir.), *cert. denied*, 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974). However, the undisputed facts set forth in the instant case portray a situation distinguishable from the typical case of interspousal wiretapping. Rather than electronic surveillance directed by one spouse at another, we are confronted with a parent who recorded the conversations of a minor child while that child resided in the parent's home. Benjamin, of course,

was not talking to himself on the telephone. Nonetheless, the mere fact that the taped conversations were between Benjamin and his mother, James Grosse's former spouse, does not alter the complexion of James Grosse's actions.

We have been able to locate, and the parties have cited, only two cases in which the present situation was confronted. *See Newcomb v. Ingle,* 944 F.2d 1534 (10th Cir.1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 903, 116 L.Ed.2d 804 (1992); *Anonymous v. Anonymous,* 558 F.2d 677, 679 (2d Cir.1977). The courts in both *Newcomb* and *Anonymous* addressed the following issue: Does Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, apply to situations where a parent intercepts a minor child's telephone conversation via an extension phone within the family home. *Newcomb,* 944 F.2d at 1535; *Anonymous,* 558 F.2d at 677. Drawing upon the extension phone exemption set forth in 18 U.S.C. § 2510(5)(a)(i), both courts answered the question negatively. Section 2510(5)(a)(i) provides in relevant part:

> (5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral or electronic communication other than –
>
> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business. . . .

Both the Second and Tenth Circuits held that, unlike the typical circumstance of interspousal wiretapping, the

interception of a minor child's telephone conversations by use of an extension phone in the family home is permitted by a broad reading of the exemption in § 2510(5)(a)(i). *Newcomb*, 944 F.2d at 1536; *Anonymous*, 558 F.2d at 679. "There is no persuasive reason why Congress would exempt a business extension and not one in the home." *Newcomb*, 944 F.2d at 1536. In support of their respective holdings, both courts noted that the legislative history of Title III revealed that Congress considered the very problem of a parent eavesdropping on a minor child within the family home. Indeed, as pointed out by the Second Circuit, the language "ordinary course of [the user's] business" was added to the House bill only after Professor Herman Schwartz testified that he feared that the original version of the bill would permit policemen and private intruders to enter others' homes and listen in on extension phones without penalty. *Anonymous*, 558 F.2d at 679. Professor Schwartz, however, did not recommend deleting the extension phone exemption altogether. To be sure, Professor Schwartz stated: "Now, we can see in certain circumstances where [the exemption] makes some sense. I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm., 90th Cong., 1st Sess. 989 (1967). Both the Second and Tenth Circuits found this statement by Professor Schwartz reflective of "the general understanding of those involved in the legislative process regarding the scope of the statute" in situations involving parental eavesdropping on a minor child via an extension telephone. *Newcomb*, 944 F.2d at 1536 n. 5; *Anonymous*, 558 F.2d at 679.

In the instant case, from his own home – where Benjamin was residing at the time – James Grosse recorded his minor son's phone conversations from an extension phone. Finding the rationale set forth in both *Newcomb* and *Anonymous* persuasive, we hold that Title III does not reach James Grosse's conduct, however wise such conduct may be. The fact that Grosse taped the conversations, as opposed to merely listening in, is "a distinction without a difference." *Anonymous*, 558 F.2d at 679. In the absence of a violation of Title III by James Grosse, no violation for unlawful disclosure by the Grants or Johnson can be established. *See Newcomb*, 944 F.2d at 1536. Accordingly, we grant the Grant's motion for summary judgment on Count I of plaintiffs' complaint. Further, we *sua sponte* grant summary judgment on Count I on behalf of Dorothy Johnson.

B. The Illinois Eavesdropping Statute

Count II of plaintiffs' complaint sets forth a claim under the Illinois Eavesdropping Statute, Ill.Rev.Stat. ch. 38, ¶ ¶ 14-1 *et seq.* Paragraph 14-2 provides in relevant part:

> A person commits eavesdropping when he . . . [u]ses or divulges, except as authorized by this Article or by Article 108A or 108B of the "Code of Criminal Procedure of 1963," approved August 14, 1963, as amended, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

Ill.Rev.Stat. ch. 38, ¶ 14-2(b) (Supp.1992). A civil remedy to injured parties is provided in paragraph 14-6, which

explicitly grants t[he court the discretion to award punitive damages.[2] *Id.* ¶ 14-6(1).

Assuming for [the sake of the present motion that the Grants and Johnso[n have committed the offense of eavesdropping as defi[ned in the Illinois Eavesdropping Statute, each defenda[nt nonetheless is entitled to summary judgment. Contra[ry to plaintiffs' assertion, the cause of action set forth in [Count II, being provided by state law, may be subverted [by overriding state policy. For example, it is well es[tablished that attorneys are absolutely immune from liab[ility for defamatory statements that are reasonably relate[d to the subject of ongoing litigation. *See Auriemma v. Mont[gomery*, 860 F.2d 273, 277 (7th Cir.1988), *cert. denied*, 492 U[.S. 906, 109 S.Ct. 3215, 106 L.Ed.2d 565 (1989); *McGrew v. [Heinold Commodities, Inc.*, 147 Ill.App.3d 104, 114, 110 Ill.[Dec. 446, 476, 497 N.E.2d 424, 454 (1st Dist.1986). Drivin[g this rule is the overriding public policy that "the need[s of litigants and their advocates in the

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[2] We note that [t the court possesses jurisdiction over this claim on the basi[s of the parties' diversity of citizenship. Despite the fact tha[t plaintiffs have not plead actual damages in excess of $50,000, [we must consider their claim for punitive damages in determ[ining the jurisdictional amount, such damages being available [e for under Illinois law. *See Sharp Elec., Corp v. Copy Plus, Inc.*, [939 F.2d 513, 515 (7th Cir.1991). While we believe that any aw[ard in excess of $50,000 would be excessive and likely set aside [e for that reason, such a conclusion cannot " 'be judicially mad[e before [the] verdict [is] rendered.' " *Bell v. Preferred Life Society*[, 320 U.S. 238, 243, 64 S.Ct. 5, 7, 88 L.Ed. 15 (1943) (quoting *Bar[ry v. Edmunds*, 116 U.S. 550, 565, 6 S.Ct. 501, 509, 29 L.Ed. 729 [(1886)); *Sharp Elec. Corp.*, 939 F.2d at 515. Accordingly, we m[ust exercise jurisdiction over Count II of plaintiff's complain[t.

judicial process require that advocates be able to vigorously present their clients' cases without having to fear being sued." *Auriemma,* 860 F.2d at 277. The same rationale which would immunize defendants from liability for defamation must also absolve them from liability under the Illinois Eavesdropping Statute.

In the instant case, defendants' conduct of disclosing portions of the taperecorded conversations was intimately associated with the ongoing custody and removal proceeding in the Circuit Court of Cook County. The unique roles that attorneys perform as advocates and GALs in such judicial proceedings mandate that they be able to participate zealously without intimidation or harassment. Most significant to our conclusion that defendants are entitled to absolute immunity for the alleged disclosures, although subject to abuses, there are sufficient safeguards within the judicial process to protect litigants from the type of overzealousness presently alleged. *Cf. Auriemma,* 860 F.2d at 279 (attorneys not entitled to absolute immunity for extra-judicial investigation because such investigation is not subject to the rules of discovery and, falling outside the judicial process, cannot be halted by the trial court). Included in the trial court's arsenal to combat such abusive conduct is suppression of the disclosed evidence and, in extreme cases, disciplinary sanctions. Consequently, the Grants' motion for summary judgment on Count II is granted, and we *sua sponte* grant summary judgment on behalf of Johnson.

IV. Conclusion

For the reasons set forth above, we grant the Grants' motion for summary judgment, and *sua sponte* grant summary judgment on behalf of defendant Dorothy Johnson. It is so ordered.

(2)

Supreme Court, U.S.
FILED
SEP 12 1994
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No. 94-0260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LYNN A. SCHEIB, BENJAMIN GROSSE, a minor, by LYNN A. SCHEIB, his next friend, and CARL SCHEIB,

Petitioners,

v.

JOAN C. GRANT, BURTON F. GRANT, and DOROTHY B. JOHNSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS JOAN C. GRANT AND BURTON F. GRANT IN OPPOSITION

GEORGE B. COLLINS
Counsel of Record
GREGORY A. BEDELL
COLLINS & BARGIONE
One North LaSalle Street
Suite 2235
Chicago, Illinois 60602
(312) 372-7813

Attorneys for Respondents Joan C. Grant and Burton F. Grant

September 12, 1994

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED FOR REVIEW

1. Wi her the decision of the Seventh Circuit Court of Appeals, based upon decisions of the Second and Tenth Circuits, properly held that a father, who monitors the telephone conversations of his eleven year old son out of concern that the boy is being abused, did not violate the Omnibus Crime Control and Safe Streets Act of 1968.

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No. 94-0260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LYNN A. SCHEIB, BENJAMIN GROSSE, a minor, by LYNN A. SCHEIB, his next friend, and CARL SCHEIB,

Petitioners,

v.

JOAN C. GRANT, BURTON F. GRANT, and DOROTHY B. JOHNSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS JOAN C. GRANT AND BURTON F. GRANT IN OPPOSITION

STATEMENT OF THE CASE

A father[1] observed his eleven year old son, Petitioner Benjamin Grosse, become visibly upset immediately after the boy talked on the phone with his mother, Petitioner Lynn Ann Scheib, and his step-father, Petitioner Carl Scheib. When this sequence of events occurred several times, the father attempted to talk with the child about what was disturbing him. However, the boy shunned his father's, and a sibling's, attempts to speak with him.

Because the boy refused to discuss anything, and because the episodes occurred only after conversations with Ms. Scheib, the father used the recording feature on a common, store bought answering machine attached to an extension phone in his home to record two conversations between the boy and Ms. Scheib. The father then listened to the recordings and, due to their content, brought them to his attorneys, Respondents Joan C. Grant and Burton F. Grant.

Joan Grant was the primary attorney representing the father in a custody and removal proceeding (the "Removal Proceeding") prompted by Ms. Scheib's decision to remarry and leave the jurisdiction of Illinois.[2] At the time the father brought the tapes to her, the dispute had been resolved between the parties. The father and Ms. Scheib had executed an agreement which allowed Ms. Scheib to remove the boy to Pennsylvania; the father retained extended visitation rights; and the agreement included "joint parenting" pro-

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[1] The father, James Grosse, is not a party to this suit. Pursuant to a settlement agreement between him and Petitioner Lynn Ann Scheib, Ms. Scheib agreed not to sue her ex-husband for any of the acts which have given rise to this suit. Instead, Ms. Scheib has sued Mr. Grosses' attorneys. See Memorandum Opinion and Order of the District Court, App. pp. 25-26.

[2] Ms. Scheib and James Grosse were divorced in 1982.

visions calling for each parent to participate in the major decisions affecting the boy.

The agreement, although signed by the parties, required approval by the judge presiding over the Removal Proceeding. The observed change in the boy's behavior and the subsequent taping occurred *after* the agreement was signed but prior to the scheduled hearing in the Removal Proceeding. The boy was lawfully with his father during this interim pursuant to the summer visitation provisions of the agreement.

When the parties appeared again in the Removal Proceeding, Ms. Scheib's attorneys informed the court of the taping. The following day the parties again appeared in court and again the issue of the tapes was raised. The judge then asked Joan Grant: "What about the tapes, Mrs. Grant?" Joan Grant then related what she heard when the father played the tapes for her, stating to the court:

> Your Honor, the child is being terrorized. The mother has embarked upon a course of conduct calculated to destroy any possible relationship between the child and the father. And the mother has gotten on the telephone and used profanities, threats to the child, violent statements. Your Honor, he wants to testify. He wants to tell you about these tapes, and I want the tapes to be put in the record. And I want the Court to know what the mother tells this little boy. I can't even lower myself, your Honor, to say the words that this mother is telling this little boy, that Mrs.—the stepmother, she is a fucking asshole, and that "I won't talk to you, you little shit, if you don't do what I say." And, "You keep a diary every day." And "You are having a shitty time there, aren't you?" And "It's too bad you have to stay," and she is—she—"just piss off on her. You just tell the women to piss off of you. You will come back. You will never have to come back. You will

> come back. I will get you back here. You won't stay there. We will see to it that you will never go back and see your dad again."[3]

Joan Grant had also related the substance of the conversation to the boys guardian *ad litem* and one of Ms. Scheib's attorneys.

Ms. Scheib then retained a major Chicago law firm to file a motion *in limine* to prevent the court from hearing the recording of her conversation with the boy. The evidentiary issue was fully briefed and the judge orally granted Ms. Scheib's motion.[4] Ms. Scheib's attorneys, however, never prepared an order reflecting the judge's oral ruling. As a result, under Illinois law, the judge's statements had no effect. Subsequently, the parties resumed negotiations and settled the matter.[5]

Less than six months later, the Petitioners filed their suit against Respondents.

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[3] The Petitioners never filed any responsive pleading or affidavit in the District Court proceeding, including their pleadings in opposition to Respondents' motion for summary judgement, challenging the accuracy of Joan Grant's recitation of the conversation. The Petitioners also opposed the Respondents efforts to have the tapes unsealed.

[4] Contrary to Petitioners' Statement of the Case, the court in the Removal Proceeding made no decisions on a minor's right to privacy. The only issue before the court was an evidentiary question.

[5] Contrary to the Petitioners' Statement of the Case, the court in the Removal Proceeding never refused to include a release which would have covered the Respondents. No such release was ever presented to the judge; rather, Ms. Scheib refused to agree to it in negotiations and the final draft of the agreement, and the only one presented for review by the court, did not include a general release. In the agreement, Ms. Scheib only promised not to sue the boy's father.

SUMMARY OF THE ARGUMENT

The Seventh Circuit, in accord with two other Circuits addressing similar situations, properly held that an explicit exemption in the Federal wiretapping act applied to the facts presented in the case. The Circuit Court did not create any new exceptions; rather, the court correctly concluded that the plain language of the exemption, which removes from the prohibitions of the act the use of an extension phone by the subscriber of the phone service in the ordinary course of that subscriber's business, applied in the case.

The court, like the majority of other circuits, rejected the notion that the wiretapping statute contains any "domestic relations" exception and held that the exemption did apply to a father who used an ordinary answering machine, attached to an extension phone in his home, to record conversations of his eleven year old son after previous conversations made the boy visibly upset. The court reasoned that the father was a subscriber and that investigating a perceived harm to his child was within the ordinary course of a parent's business.

ARGUMENT

I.

ALL UNITED STATES CIRCUIT COURTS OF APPEAL THAT HAVE ADDRESSED THE EXTENSION TELEPHONE EXEMPTION ARE IN ACCORD THAT A PARENT MAY USE AN EXTENSION TELEPHONE IN THE HOME TO MONITOR THE CONVERSATIONS OF A MINOR CHILD.

There is no conflict among the Circuit Courts of Appeal. All Circuits presented with factual situations analogous to those presented here have held that the Federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. (the "Act"), does not prohibit a parent from using an extension telephone located in the parent's home from listening to or tape recording a minor child's telephone conversation. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991); *Janeka v. Franklin*, 843 F.2d 110 (2d Cir. 1988); *Scheib v. Grant*, 22 F.3d 149 (7th Cir. 1994).

None of the cases cited by the Petitioners, with the exception of another Tenth Circuit case, *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992), involve a parent/subscriber of telephone service using an extension phone in the home to monitor his or her child's telephone calls. *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976) (husband placed recording device on marital phone to catch wife in affair); *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991) (interception to confirm spouses affair); *Bess v. Bess*, 929 F.2d 1332 (8th Cir. 1991) (spouse spying to gain information for divorce); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989) (spying by husband on wife to confirm affair); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984) (ex-spouse intercepted conversations with no indication that child's welfare was involved).

Also, *Platt v. Platt*, 951 F.2d 159 (8th Cir. 1989) is not in conflict with the Seventh Circuit's decision. In *Platt*, a wife spied on her estranged husband by taping her daughter's conversation with her spouse during the pendency of a divorce proceeding. The district court dismissed the husband's complaint at the pleading stage based on interspousal immunity. The Court of Appeals reversed finding no interspousal immunity under the Act. The extension telephone exemption was not raised by the wife as a defense. Moreover, under the facts recited, the exemption should not have been applied. Nothing objective indicated that the wife was doing anything more than spying; the child's welfare was not involved.

Likewise in *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992), the Tenth Circuit reversed a decision of a district court, which held that the Act did not apply to a "domestic dispute situation," reiterating its holding in *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991)[6] that there is no interspousal exception in the Act. 970 F.2d at 746. Significantly, the Tenth Circuit decision in *Thompson* left *Newcomb* entirely intact.

In addition, the court observed "[n]o language in the statute evidences a congressional intent to except tapping *in this factual setting*." 970 F.2d at 748 (emphasis supplied). The court added: "we hasten to note that not all wiretap interceptions involving spouses will be actionable." *Id.* In then discussing why such interceptions may not be actionable the court referenced the extension phone exemption, noting "[t]he scope of this section has not been developed." *Id*, nt. 5. The mother in *Thompson* raised several defenses,

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[6] The defendant in *Heggy*, the director of the Oklahoma Bureau of Narcotics and Dangerous Drugs, instructed one of his agents from the Bureau to install a tap on the phone in his barn.

including a parent's right to consent for her minor child, but the extension phone exemption was not raised.[7]

Examination of the actual application of the Act to specific factual situations reveals there is no conflict among the Circuits which requires this Court's intercession.

II.

THE SEVENTH CIRCUIT CORRECTLY APPLIED THE PLAIN LANGUAGE OF THE ACT AND ITS EXTENSION TELEPHONE EXEMPTION TO THE FACTS PRESENTED. CONTRARY TO THE PETITIONERS' ASSERTIONS, THE SEVENTH CIRCUIT DID NOT CREATE A NEW EXEMPTION.

Petitioners deflect attention from the language of the statute and its application to the facts by semantically framing the issue as whether the Seventh Circuit created a "domestic relations" exception to the Act. That Court's Opinion, however, illustrates a prudent examination of the statutory language.

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[7] As the Opinion observes, the court's attempt in *Thompson* to distinguish *Newcomb* is somewhat cryptic. If read literally, the distinction would have allowed the father in *Newcomb*, who instructed his son to set fire to his mother's home, to successfully bring an action under the Act. Thus, to the extent that *Thompson* applies the exemption based on who is on the phone rather than determining if the *use* of the extension phone was proper, the decision is not well reasoned and should not be followed. The facts in *Newcomb*, and the instant case, illustrate the most severe flaw in applying the exemption based on the identity of the conversants: dangerous or cruel and abusive treatment of a child would become unreportable, even when known to a parent.

A. The Opinion, and the decisions of other Circuits, reject an "interspousal exception" to the Act and focus on the facts of a particular case in applying the extension phone exemption.

The Opinion appropriately focused on the exemption's requirement that it applies only to "subscribers" and "users" in the "ordinary course of business."[8] As the Opinion noted, telephone subscribers include both commercial and non-commercial customers, such as family homes. Further, the concept of a "domestic relations exception" never entered the analysis, other than to note that such an exception had been previously rejected.

Petitioners claim, that wiretapping is not an "ordinary" function of a parent, skews the statutory analysis and proper application of the Act's language. What must be considered, and what the Opinion examined, is the actual function of a parent. The Seventh Circuit correctly concluded that the function included "the need for parents with whom a minor child is living to obtain information concerning that child's welfare." App., p. 10, *Scheib v. Grant*, 22 F.3d at 153.

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[8] The Opinion holds that the phrase "ordinary course of business" should not be restricted in its meaning to only profit making endeavors. The court noted that this Court refused to read a profit-seeking activity into a statute absent clear language to that effect. App., p. 13, nt. 4, 22 F.3d at 154-155, nt. 4. In addition, this phrase is often used outside a commercial context. *See Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 36, 74 L.Ed.2d 765, 793, 103 S.Ct. 927 (1983) (dissenting opinion of the Chief Justice wherein the opinion refers to issues "that district judges decide every day in the ordinary course of business"). *See also Wilharms v. Wilharms*, 93 Wis.2d 671, 673, 287 N.W.2d 779, 781 (1980) (parties to divorce proceeding enjoined from disposing of personal assets "except in the ordinary course of business"); *see also, Pereira v. United States*, 347 U.S. 1, 9, 98 L.Ed. 435, 445, 74 S.Ct. 358 (1953) (knowledge that mail system will be used "in ordinary course of business" sufficient to establish cause for mail fraud).

This case, *Anonymous*, and *Newcomb* involved one parent using the cloak of a telephone line to abuse or place a minor child in jeopardy. Each decision properly held that the parent's use of an extension phone to monitor and record a minor's conversation, even with another parent, was justifiable supervision under the circumstances.

The decisions in *Platt* and *Thompson* illustrate that guidance from this Court is not necessary. Indeed, these cases show that Petitioners' dire prediction of rampant intra-family eavesdropping based on a "meaningless limitation of an assertion of proper purpose" is hyperbole. Each court (like the Seventh Circuit's Opinion) rejected any notion of a "domestic relations" or "interspousal" exemption and allowed actions to proceed under the Act.[9]

In this case, the uncontroverted facts demonstrated an emotionally disturbed eleven year old boy and cruel words from the mother hidden from discovery only because they were spoken under the cover of a phone line. These facts provided the "objectively reasonable" belief that justified the father's intervention. Thus, contrary to the Petitioners' assertion, courts understand the limits and bounds of the Act and the extension phone exemption as applied to a family context.

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[9] On remand, the District Court in *Thompson* examined the directions of its appellate court, as well as its previous decisions in *Newcomb* and *Heggy* and stated in support of its holding that a parent may vicariously consent to recording: "In this case, or perhaps a more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating minor children, vicarious consent is necessary to enable the guardian to protect the children from further harassment in the future. Thus, as long as the [parent] has a good faith basis that is **objectively reasonable for believing that it is necessary** to consent to the taping of the phone conversations, vicarious consent will be permissible in order for the [parent] to fulfill her statutory mandate to act in the best interest of the child." *Thompson v. Dulaney*, 838 F.Supp. 1535, 1544 (D.Utah 1993) (emphasis added).

B. The descriptive labels Petitioners use to characterize phone calls miss the point of the exemption.

Petitioners engage in some interpretive gymnastics, claiming that other Circuits have prohibited monitoring of private phone calls, citing *Watkins v. L.M. Berry*, 704 F.2d 577 (11th Cir. 1983) and *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974).

Yet, these cases demonstrate that *why* the monitoring occurred is more important than the identity of the caller or the label placed on the call. The court in *Watkins* drew on the analysis of the Fifth Circuit in *Briggs v. American Air Filter Co.*, 630 F.2d 414 (5th Cir. 1980), stating:

> the business extension exception operates without regard to consent. So long as the *requisite business connection* is demonstrated, the business extension exemption represents the 'circumstances under which non-consensual interception' is not violative of section 2511(1)(b). 704 F.2d at 581, quoting *Briggs*, 630 F.2d at 419 (emphasis added).

The "requisite business connection"—an appropriate reason why the employer listened—was not present in *Watkins* because the business whose extension phones were being used **explicitly permitted** employees to use the phones for personal calls; there could be no reason to listen to personal calls if they were permitted. The court thus held the exemption did not apply. The court added, however, that interception is permissible "to the extent necessary to guard against unauthorized use of the telephone." *Id.*

When no justifiable reason to monitor existed, the Circuit Courts have uniformly refused to apply the exemption. Cf. *Campiti v. Walonis*, 611 F.2d 387, 390, 392 (1st Cir. 1979) (not in ordinary course of business for prison guard to set-up a prisoner; the court, however, did not condemn the prison's policy of monitoring inmate conversations when

there was "reason to expect illegal inmate activity"); cf. *Gerrard v. Blackman*, 401 F.Supp. 1189, 1193 (N.D.Ill. 1975) (not in ordinary course of hospital's business "to intercept communications between patients and their counsel, a practice which would not be justified even if customary"); cf. *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974) (court finding tape of law enforcement officers' conversation was not telephone used in the ordinary course of business).

Where an appropriate reason was given relating to the subscriber's business, the Circuits have applied the exemption in a business context, even to personal calls. In *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986), the court examined why the employer listened and found a legitimate purpose in monitoring the plaintiff's personal calls "because the content of the conversation dealt with employee relations, which is of direct concern to St. Mary's." 802 F.2d at 416.[10]

Neither the Opinion nor the decisions of other Circuits have strayed from the strictures of the Act and its purpose. The exemption has been sustained only where the user objectively proved a proper reason for monitoring over an extension phone.

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[10] Even the dissenting opinion, which took issue with the result, applied as its test an examination of why the recording occurred at the time it was made. 802 F.2d at 417-418.

III.

THE EMERGING NOTION OF CHILDREN'S RIGHTS DOES NOT SUPERSEDE A PARENT'S RESPONSIBILITY FOR THE CARE AND PROTECTION OF A CHILD'S WELFARE. THE PARENT WITH ACTUAL CUSTODY IS ENTITLED, AND OBLIGATED, TO ACT TO PROTECT HIS CHILD.

A. This Court has acknowledged the balance between children's rights and the need to protect children from harm.

The age and maturity of the minor, and the right involved, are factors which must be examined in every case relating to a minor and his or her relationship to the parent. In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 49 L.Ed.2d 788, 96 S.Ct. 2831 (1976), this Court noted:

> We emphasize that our holding that sec. 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. 428 U.S. at 75, 49 L.Ed.2d at 808, 96 S.Ct. at 2844.

See also Carey v. Population Services Int'l., 431 U.S. 678, 692-3, 52 L.Ed.2d 675, 689-90, 97 S.Ct. 2010 (1977) (quoting the above, nt. 16, and observing that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults", quoting *Prince v. Massachusetts*, 321 U.S. 158, 170, 88 L.Ed. 645, 64 S.Ct. 438 (1944)).

In dissenting on that portion of the opinion in *Planned Parenthood* dealing with parental consent, Justice Stevens summarized the special treatment children receive exactly because they are children:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bar-

> gain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. 428 U.S. at 102, 49 L.Ed.2d at 823-824, 96 S.Ct. at 2856.

The Illinois Supreme Court likewise recognized that age and maturity are the essential factors effecting the breadth of a child's rights. In *In Re E.G.*, 133 Ill.2d 98, 549 N.E.2d 322 (1989), the court observed that "[a] minor may have a long and fruitful life ahead that an immature, foolish decision could jeopardize." 133 Ill.2d at 110, 549 N.E.2d at 327. The court also recognized that certain child's rights are "not absolute" and that trial courts faced with competing concerns of rights versus protection must "determine whether a minor is mature enough" to consider and appreciate the consequences of their actions. 133 Ill.2d at 110-111, 549 N.E.2d at 326-328. Because the child in *In Re E.G.* was seventeen, and because the trial court went to great lengths in evaluating her maturity, the Illinois Supreme Court found that she was entitled to refuse medical treatment.

The state places primary responsibility of protecting minors squarely on the shoulders of parents. And, the parents' right to raise their children is constitutionally protected. This Court confirmed this special position in *Hodgson v. Minnesota*, 497 U.S. 417, 111 L.Ed.2d 344, 110 S.Ct. 2926 (1990), quoting from *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), this Court noted:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. [citation omitted]. The integrity of the family unit has found protection in the Due Process

> Clause of the Fourteenth Amendment, [citations omitted], the Equal Protection Clause of the Fourteenth Amendment, [citations omitted] and the Ninth Amendment [citations omitted]. 497 U.S. at 447, 111 L.Ed.2d at 369, 110 S.Ct. at 2943.

The test Petitioners postulate, what a teenager may think about a parent listening to his telephone conversations, is irrelevant and, we suggest, dangerous. The child in the instant case was only eleven years old and obviously in distress. A parent observing harm to his child cannot abdicate responsibility in deference to what a child may think.

And, that is what a good parent will always do. We submit that the extension phone exemption is there to allow just exactly the parental act which occurred here. See Opinion, District Court, App. p. 28: Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm., 90th Congress, 1st Sess. 989 (1967).

B. The parent with lawful, actual custody of a minor child may, and must, act to protect the child in accord with the child's best interests.

On the weight of reason and precedent, the Opinion rejected the suggestion, made again here by Petitioners, that "legal" custody precludes a parent with actual, lawful custody from taking action in the child's best interest.

The agreement into which Ms. Scheib and the father entered contained a provision which correctly states Illinois law:

> Each party shall have the day to day decision making authority regarding BENJAMIN when BENJAMIN is in that party's respective physical possession. (R.40, Ex. 3, p.7).

The right of visitation is defined in Illinois precedent as ". . . a form of custody." *People v. Harrison*, 82 Ill.App.3d

530, 532, 402 N.E.2d 822, 824 (4th Dist. 1980). A determination of custody under Illinois statute is a determination "including visitation rights." 750 ILCS 35/3.02 (Smith-Hurd 1993). The term "person having custody" in the Illinois Juvenile Court Act includes "parents who had rights of visitation subject to the general custody in the other parent." *In re Rider*, 113 Ill.App.3d 1000, 1003, 447 N.E.2d 1384, 1386 (4th Dist. 1983).

Every parent of a child, when with the child, has what is both in law and in fact custody of that child, with the rights and duties of that status. *In re Myer*, 100 Ill.App.3d 27, 31, 426 N.E.2d 333, 336 (4th Dist. 1981); *see also In re Markey*, 223 Ill.App.3d 1055, 586 N.E.2d 350 (1st Dist. 1991) (the child's best interest required that either parent be allowed to grant access to the child's mental health records).

The statute and precedent comport with reality: when a child is lawfully with a parent, then that parent can do whatever any parent can do when that child is with a parent. This unquestionably extends to decisions involving the health and welfare of the child.[11] Thus, no logical or legal basis supports Petitioners' suggestion that the father's actions were inappropriate simply because (they claim) he was not his son's "legal custodian."

CONCLUSION

This case presents neither a conflict between the Circuits nor unsettled questions of statutory application. Courts of Appeal and District Courts have correctly read and applied

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[11] *See Taylor v. R.D. Morgan & Assoc.*, 205 Ill.App.3d 682, 691, 563 N.E.2d 1186, 1192 (5th Dist. 1990) (in emergencies, a "non-custodial" parent may consent to medical treatment when that parent has actual custody).

the Act to the specific factual situations before them. Petitioners ask this Court to intercede to review their particular circumstances, which have been adjudicated correctly and consistent with precedent.

Respondents Joan C. Grant and Burton F. Grant respectfully submit that the Petition should be denied.

Respectfully submitted,

GEORGE B. COLLINS
Counsel of Record
GREGORY A. BEDELL
COLLINS & BARGIONE
One North LaSalle Street
Suite 2235
Chicago, Illinois 60602
(312) 372-7813

Attorneys for Respondents
Joan C. Grant and
Burton F. Grant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT DOROTHY B. JOHNSON IN OPPOSITION

DOROTHY B. JOHNSON
Counsel of Record
JOHNSON & ASSOCIATES, P.C.
887 North LaSalle Street
Chicago, Illinois 60610
(312) 236-1616

Attorney for Respondent Dorothy B. Johnson

September 12, 1994

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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18 U.S.C. §2510(5)(a)(i) ..... *passim*

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Illinois

Illinois Eavesdropping Act,

720 ILCS 5/14-1 2

No. 94-0260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LYNN A. SCHEIB, BENJAMIN GROSSE, a minor, by LYNN ANN SCHEIB, his next friend, and CARL SCHEIB,

Petitioners,

v.

JOAN C. GRANT, BURTON F. GRANT, and DOROTHY B. JOHNSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT DOROTHY B. JOHNSON IN OPPOSITION

The Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") provides that using or disclosing information which one had reason to know was originally obtained in violation of the statute, is actionable under the statute. Title III, however, contains an extension telephone exemption. 18 U.S.C. § 2510(5)(a)(i). The court of appeals for the Seventh Circuit held that reading the extension telephone exemption as a whole, does not subject parents to criminal

and civil penalties for recording their minor child's telephone conversations out of concern for the child's well-being. Hence, no unlawful use or disclosure violation can be established against father's attorneys or the minor child's guardian ad litem ("GAL"). The court rejected petitioners' contention that "in the ordinary course of its business" has strictly market-oriented connotations. The court of appeals also held that no genuine issue of material fact exists as to whether concern for the child's welfare was in fact the father's purpose in taping the telephone conversations between the child and the mother. The court further held that the district court did not err in holding father's attorneys and the GAL absolutely immune from damages liability under the Illinois Eavesdropping Act, 720 ILCS 5/14-1 *et seq.*, for using or divulging the recorded conversations in a manner intimately associated with the state court proceedings.

These holdings are unassailable, and review should be denied.

STATEMENT OF THE CASE

Lynn Scheib and James Grosse were divorced in 1982. Lynn was granted sole custody of their son, Benjamin, and James had visitation privileges. In February, 1991, Lynn filed her Petition for Removal of Benjamin to Pennsylvania. On February 11, 1991, the state court appointed Dorothy Johnson as GAL for Benjamin. The parents endeavored to settle the disputes existing between them, and on June 19, 1991, executed a written settlement subject to court approval. Prior to court approval, Lynn moved to Pennsylvania, and Benjamin remained with his father in Illinois for extended summer visitation.

While Benjamin was in Illinois with his father, the agreement of the parents broke down. Following telephone conversations with his mother, Benjamin became angry and upset and behaved in a negative and anti-social manner. Using a telephone answering machine attached to an extension telephone, father recorded two conversations between Benjamin and his mother. Neither Benjamin nor his mother had knowledge of the taping at the time of either conversation.

Father believed that the conversations revealed that Lynn was subjecting Benjamin to emotional distress and took the tapes to his attorneys. While engaged in a telephone conference with Joan Grant, attorney for James, the GAL overheard portions of a taped conversation and was advised that James now questioned Lynn's good faith intent to abide, in spirit and in keeping, with the June 19, 1991 written agreement.

After learning of the existence and content of the tapes from respondents, Lynn's attorneys filed a motion in limine as to the introduction of the tapes by James or the GAL. The state court ordered James and the GAL to file a memorandum of law in response to the motion in limine. The GAL opposed the motion in limine on the ground that the state court should hear any and all relevant evidence to determine the best interests of the child, whose interests are paramount.

Although the state court granted Lynn's motion in limine on August 2, 1991, the ruling was never reduced to a written order because the parents reached settlement as to the underlying case. On August 5, 1991, the state court entered the written settlement as an agreed order, retroactive to June 19, 1991, after allowing inquiry of Lynn as to her intention of prosecuting James in connection with the tape recordings. Contrary to petitioners' representation, the GAL

did not seek a release as to herself, nor did she present such an issue to the state court. Lynn subsequently filed this federal action against James' attorneys and the GAL alleging violations of Title III and the Illinois Eavesdropping Statute.

District court proceedings. Joan and Burton Grant filed a motion for summary judgment which asserted that Title III does not apply to situations where a parent intercepts a minor child's telephone conversation via the extension telephone exemption and that the facts of this case distinguish it from prohibited interspousal wiretaps. Relying upon *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 903 (1992) and *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), the district court agreed that a broad reading of the § 2510(5)(a)(i) exemption for telephone equipment being used by the "subscriber or user in the ordinary course of its business" exempts a home extension telephone as well as a business extension telephone. The district court noted that the legislative history of Title III reveals that Congress did not intend to criminalize parental eavesdropping on a minor child via an extension telephone within the family home. Appendix to Petition (hereafter "App."), 28. The district court thus held that inasmuch as James' conduct was exempted from Title III, no violation for unlawful use or disclosure by the respondents can be established under Title III. App. 29.

Joan and Burton Grant's motion for summary judgment also asserted that their actions before the state court as advocates for James were entitled to the same absolute immunity from liability accorded defamation at common law. In addressing petitioners' claim that respondents had violated the Illinois Eavesdropping Act by using or divulging the recorded conversations, the district court assumed *arguendo* that the attorneys and GAL had violated the

statute, but granted summary judgment nonetheless because of the overriding public policy need for vigorous advocacy intimately associated with judicial proceedings. The rationale stated by the district court provides attorneys with immunity from liability under the Illinois Eavesdropping Statute for the same reason attorneys are absolutely immune from liability for defamatory statements that are reasonably related to the subject of litigation. App. 31.

The court of appeals' opinion. The court of appeals reviewed the district court's decision *de novo* and agreed that the question of interspousal wiretapping is not the issue presented by the facts in this case and affirmed that James' conduct did not violate Title III. App. 9. It noted that the decision of *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991) *cert. denied*, 112 S.Ct. 1514 (1992), on which petitioners continue to rely, distinguishes interspousal wiretapping from a custodial parent tapping a minor child's conversations within the family home. App. 11-12 n.3 The court rejected petitioners' argument that the custodial status of a parent should be an outcome determining factor in applying the extension telephone exemption and focused instead on the need of parents, with whom minor children live, to obtain information concerning children's welfare. App. 10. The court further rejected petitioners' argument that the language of § 2510(5)(a)(i) "subscriber or user in the ordinary course of its business" should be confined strictly to commerce when a "subscriber" or "user" has a personal life as well as a commercial one. App. 12. The court of appeals found no genuine issue of material fact as to James' motive or intent in recording the conversations between Benjamin and Lynn, as the evidence showed that Benjamin was inexplicably upset after speaking with his mother. App. 14 n.5

The court of appeals extensively reviewed public policy concerns and the district court's application of the common

law rule prohibiting defamation actions against attorneys who make statements in relation to judicial proceedings to Illinois Eavesdropping Statute actions against attorneys who use or disclose information in a manner intimately associated with judicial proceedings. App. 16-17. As to James' attorneys, the court affirmed absolute immunity because there was no evidence of extrajudicial disclosure and their only disclosure to the court, opposing counsel and the GAL was intimately associated with the ongoing judicial proceeding. App. 18. As to the GAL, the court affirmed absolute immunity because her actions of listening to a portion of a tape during a telephone conversation which concerned Benjamin's welfare and later opposing the motion in limine was conduct intimately associated with her GAL function in the judicial process. App. 19.

Lynn petitioned for rehearing *en banc*. Contending that interspousal wiretapping is the issue, petitioners challenged the panel's decision as to the use of the extension telephone exemption to intercept a minor child's telephone conversation within the family home as being in direct conflict with decisions of the court and other courts of appeals. Petitioners also asserted that the panel overlooked a triable issue of material fact as to whether James recorded the telephone conversations because of concern for Benjamin, or because of his desire to obtain negative information about Lynn. Finally, petitioners asserted that the panel's granting of absolute immunity to James' attorneys and the GAL, while they functioned within the judicial process, was unprecedented and revolutionary. (The petition for certiorari has abandoned this argument.) No member of the court of appeals voted to rehear the case.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' EXTENSION TELEPHONE EXEMPTION TO INTERCEPT A MINOR CHILD'S TELEPHONE CONVERSATION WITHIN THE FAMILY HOME IS CONSISTENT WITH DECISIONS OF OTHER CIRCUITS AND SHOULD NOT BE REVIEWED.

A. There Is No Basis To Review This Decision As An Interspousal Issue.

Petitioners assert that the recent case of *Thompson v. Dulaney*, 838 F.Supp. 1535 (D. Utah, 1993) wherein mother recorded telephone conversations between her young children and her estranged husband, is factually indistinguishable from this one and directly conflicts with the decision of the court of appeals. The petitioners' reliance is misplaced.

Thompson, was not a § 2510(5)(a)(i) extension telephone exemption case. It was a § 2511(2)(d) vicarious consent case. At the district level, the court simply ruled that Title III is inapplicable because the case was a "domestic dispute situation." Although, the district court stated that it relied on *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), it did not otherwise address the case from the aspect of the extension telephone exemption detailed at page 678.

On appeal, the Tenth Circuit discussed its recent decisions of *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1514 (1992), that Title III applies to interspousal wiretapping within the marital home; and *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 903 (1992), that interspousal tapping is "qualitatively different" from parental tapping within the home, but did not address § 2510(5)(a)(i) in the body of its decision. While noting that not all wiretapping interceptions involving spouses will be actionable, the court enumerated three defenses and then added § 2510(5)(a)(i) as a

footnote. *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992) at 748 n.5 The defense propounded by the mother in the court of appeals was a § 2511(2)(d) consent exception, and the court remanded because the district court had not ruled on that defense.

On remand, the extension telephone exemption was never argued and the district court never addressed § 2510(5)(a)(i) in denying the mother's renewed motion for summary judgment. Although the district court concluded that mother could vicariously consent for her minor children as a matter of law, there were factual issues as to whether she gave such consent, and if so, whether it was prior consent. Factually, the mother was temporarily residing with the parties' children in a home owned and occupied by her parents and the telephone equipment was also owned by the parents. Moreover, the facts developed on remand were that mother's tapping was personally motivated by her own insecurity, rather than by her exercise of parental responsibility.

In the present case, the court of appeals reviewed the district court's decision *de novo* and specifically delineated the issue in this case at the very outset of its discussion of Title III at App. 8:

> The issue in this case is not whether the defendants' activities fall under 18 U.S.C. § 2511(c) & (d), but rather whether James' conduct in taping the conversations between Benjamin and Lynn was exempted from Title III by virtue of the extension phone exemption of 18 U.S.C. § 2510(5)(a)(i).

The court of appeals considered facts that the recordings took place at a time when eleven year old Benjamin was properly in the care of his father at the residence owned and occupied by James and his family. Known to Lynn, James' home was equipped with extension telephones, a

cordless telephone and an answering machine. All of these electronic devices were commonplace, legal merchandise, owned and installed by James into his subscribed telephone service. Following telephone conversations with Lynn, James observed Benjamin become angry and upset and behaving in a negative and anti-social manner toward his father and siblings. Using his telephone answering machine attached to an extension telephone, James recorded two conversations between Benjamin and Lynn to determine Benjamin's distress and change in behavior. In doing so, the court of appeals believed James was responding as a concerned parent and placed significance on the fact that Benjamin appeared to be upset after speaking to his mother. App. 14. Benjamin admitted in an affidavit that he was "angry" and "upset" and cried, but attributed it to different causes.

The court of appeals finding of parental immunity from criminal and civil penalties for recording a minor child's telephone conversations within the family home and out of concern for the child's well being is consistent with the Tenth Circuit decisions of *Newcomb*, *supra*. 944 F.2d 1534 and *Heggy*, *supra*. 944 F.2d 1537. Nor should there be any ambiguity between *Newcomb* and *Thompson*. A careful understanding of each case makes it clear that *Newcomb* is a § 2510(5)(a)(i) extension telephone exemption case and *Thompson* is a § 2511(2)(d) vicarious consent case. Decisions can often be narrow and limited to the particular facts of the case, but that should not offer a basis for review.

B. The Qualitative Difference Of Parental Immunity Has Precedence.

This Court has on no fewer than three occasions denied *certiorari* in Title III domestic wiretapping cases.

The first was *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974). After their divorce, a former wife sued her former husband for intercepting her conversations within their marital home. The court of appeals for the Fifth Circuit did an exhaustive independent search of the legislative hearings preceding the passage of Title III. The court found that of the testimony about private surveillance, only a minor portion referred to the marital situation, and the Senate Report stated, "The major purpose of title III is to combat organized crime." *Id.* at 806. Although the court was not without doubts about its decision, and said so at page 810, it concluded that the statute is not sufficiently definite and specific to create a Title III action for the redress of a former wife's grievances against her former husband for intercepting conversations within their marital home. Apparently the first reported domestic wiretapping decision, *Simpson* in hindsight clearly places the Fifth Circuit in the minority of federal circuits holding that Title III does not apply to interspousal wiretapping.

Simpson is important, however, not as a minority interspousal opinion, but for the dicta contained in its consideration of Title III's applicability to the family home. The Fifth Circuit opined that Congress did not intend to prohibit a person from intercepting a family member's telephone conversations by use of an extension telephone in the family home, which exemption is set out at 18 U.S.C. § 2510(5)(a)(i). "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." *Id.* at 809 n.17 (quoting Prof. Herman Schwartz, who appeared for the A.C.L.U.) Moreover, the Fifth Circuit thought that the 18 U.S.C. § 2510(5)(a)(i) exemption is indicative that Congress's intention was to abjure from deciding the extent of privacy family members may expect within the home vis-a-vis each other. *Id.* at 809.

The next occasion was *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1514 (1992). While the parties were living together, husband, as Director of the Oklahoma Bureau of Narcotics instructed an agent of the Bureau to place a wiretap on the marital telephone and not to disclose its existence. Husband used the wiretap for three months to record the conversations of his wife, which conversations he catalogued and labeled by date and content. After the divorce, the former wife brought suit against her former husband under the civil damages provision of Title III. The Tenth Circuit joined the majority of federal circuits which apply Title III to interspousal wiretapping within the marital home. Although the court rejected the *Simpson* court's interpretation of Title III legislative history, it distinguished that criticism of *Simpson* from its approval of *Simpson*'s parental immunity from civil claims under Title III finding, i.e. the language describing congressional intent to abstain from interference in the interrelationship of family members in the context of the House Judiciary Committee Comment concerning the right of a father to supervise his teenage daughter. *Heggy*, *supra*, 944 F.2d at 1540 n.7

Although *Heggy* did not actually deal with an extension telephone exemption, *Heggy* is important because it recognized the distinction between interspousal wiretapping within the marital home and a parent's use of an extension telephone to intercept a minor child's telephone conversation within the family home, albeit in footnotes.

The last occasion was *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 903 (1992). A son, upon attaining majority, sued his mother, his grandfather and the county prosecutor for intercepting and recording his telephone conversations with his father after his parents were divorced. The son was a minor in the custody of his

mother and within her home when the conversations were taped without the knowledge of the son. One such conversation was recorded as the father instructed the son to set fire to the home where he resided with his mother. The mother told a fire investigator about the tapes and later turned them over to the county prosecutor. After the parents stipulated in juvenile court that the son was a child in need of care, the county prosecutor did not use the tapes in the juvenile proceedings, although she did review and evaluate the tapes. The issue was whether Title III applied to a situation where a minor child sues his custodial parent for telephone interceptions made within the family home. The Tenth Circuit found the *Newcomb* situation qualitatively different from the interspousal situation of *Heggy*. The court held that the interception of a family member's telephone conversation by use of an extension telephone in the family home is accorded a broad reading of the exemption contained in 18 U.S.C. § 2510(5)(a)(i). The court was not persuaded that Congress would exempt a business extension telephone and not a home extension telephone. Citing *Simpson*, *supra*, 490 F.2d at 809, the court quoted the language describing congressional intent to abstain from deciding the extent of privacy family members may expect within the home vis-a-vis each other in the context of the House Judiciary Committee Comment concerning the right of a father to supervise his teenage daughter.

The *Newcomb* case is closest to the present factual situation, and the only case in this grouping whose facts required this Court to consider parental interception of a minor child's telephone conversation within the family home. The precedent for parental immunity from civil claims under Title III, however, can be traced back to this Court's denial of *certiorari* in *Simpson*.

II.

THE COURT OF APPEALS DID NOT OVERLOOK THE ISSUE OF A MINOR'S RIGHT TO PRIVACY.

Although petitioners do not specifically address a minor's right to privacy, there is no issue to overlook. It is not implicit that an eleven year old boy is a teenager. Neither is it implicit that Benjamin's reproductive rights were involved. *See*, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1978); and *Carey v. Population Services International*, 431 U.S. 678 (1977). Nor is it implicit that Benjamin was a mature minor entitled to refuse medical treatment. *See*, *In re E.G.*, 133 Ill.2d 98, 549 N.E.2d 322 (1989).

CONCLUSION

This respondent respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

DOROTHY B. JOHNSON
Counsel of Record
JOHNSON & ASSOCIATES, P.C.
887 North LaSalle Street
Chicago, Illinois 60610
(312) 236-1616

Attorney for Respondent
Dorothy B. Johnson

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